Dec 8, 9. Argued 12

Dec 16 Postponed

Dec. 21, Reversed Grier

SUPREME COURT OF THE UNITED STATES.

No. ~~234~~. ~~150~~. ~~71~~ ~~48~~. ~~45~~.
~~44~~ ~~42~~. 20

THOMAS M. LEAGUE, PLAINTIFF IN ERROR,
v.
DANIEL D. ATCHISON, ELIZA A. WHITE AND
ABRAM L. WHITE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS.

G. S. Gideon, Printer, No. 511 Ninth Street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 234.

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v.

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Caption.

The United States of America.

District Court of the United States, Eastern District of Texas, at Galveston, *ss.*

At a term of the District Court of the United States of America, begun and held at the city of Galveston, in and for the Eastern District of Texas, on the first Monday of the month of December, of the year of grace one thousand eight hundred and fifty-eight, to wit, on the tenth day of January, of the year one thousand eight hundred and fifty-nine, it being a day certain of said term, present the honorable John C. Watrous, judge of said court, George Mason, Esq., United States attorney, Ben. McCulloch, Esq., United States marshal, and James Love, clerk, among other were the following proceedings, to wit:

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al.
No. 477, in Law.

Be it remembered, that heretofore, to wit, on the tenth day of January, of the year of our Lord one thousand eight hundred and fifty-four, came the plaintiff herein by his attorney, and filed his petition, in words and figures in substance as follows, that is to say:

Petition.

The United States of America.

District of Texas, District Court at Galveston. January Term, 1855, to wit:

To the honorable John C. Watrous, judge of the district aforesaid:

The petition of Thomas M. League, a citizen of the State of Maryland, plaintiff, against Daniel D. Atchison, Eliza A. White, and Abram L. White, citizens of the State of Texas, resident in the city of Galveston, defendants.

And thereupon, your petitioner represents and complains that heretofore, to wit, on the first day of January, A. D. 1854, at, to wit, in the district aforesaid, he was seized and possessed in fee, as of his own property, of, in, and to a certain lot or parcel of land, situate, lying, and being in the city of Galveston, in the district aforesaid, being that lot or parcel of land which is known in the plan of said city as lot number four, in block number four hundred and forty-one, with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; and being so then and there seized and possessed as aforesaid, the said defendants afterwards, to wit, on the said first day of January, A.D. 1854, with force and arms, in the district aforesaid, entered in and upon, and then and there took possession of the said lot or parcel of ground, and then and there ejected, expelled, put out, and amoved your petitioner therefrom, and kept him so ejected, expelled, put out, and amoved, for a long space of time, to wit, from thence hitherto, and other wrongs then and there did, to the great damage of your petitioner; wherefore, he says he has sustained damage to the value of fifteen hundred dollars, and therefore he brings this his suit, &c.

The premises considered, your petitioner prays your honor to grant unto him the writs of citation directed to the marshal of the district aforesaid, commanding him to summon the defendants to be and appear in this honorable court, at the next term thereof, to be held in the court-room, in the city of Galveston, on the first Monday in the month of January next, then and there to answer this petition, together with a writ of sequestration, also directed to said marshal, commanding him to sequester said lot or parcel of land, with the hereditaments and appurtenances aforesaid, and deal with the same as required by law; and that after due trial, according to the forms of law, your petitioner may have judgment for the recovery of the said lot or parcel of land, with the hereditaments and appurtenances aforesaid, and for his costs in this behalf expended, together with such other or further judgment or order as he may be entitled to; and he further prays, that such judgment as he may obtain, be enforced by proper process of execution. And as in duty bound, he will ever pray, &c.

ROB. HUGHES,
For Plaintiff.

Memo.—This action is commenced as well to try title as to recover damages.

ROB. HUGHES,
For Plaintiff.

The United States of America, District of Texas, to wit:

This day, Thomas M. League personally appeared before me, James Love, clerk of the District Court for the district aforesaid, and made oath in due form, that he has been informed, and does verily believe, that Daniel D. Atchison, one of the defendants in the foregoing petition named, is the landlord of the other defendants, or one of them; and he, the affiant, fears that said Atchison will convert the fruits and revenue produced by and arising from the lot or parcel of land, with the hereditaments and appurtenances thereto belonging sued for, to his own use. He therefore asks for a writ of sequestration, as prayed for by the foregoing petition.

Subscribed and sworn to, 10th January, A.D. 1854.

THOS. M. LEAGUE.

Subscribed and sworn to before me, on the 10th day of January, 1854.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the twelfth day of January, of the same year, a citation to Daniel D. Atchison, issued herein, which is in words and figures in substance as follows, that is to say:

Citation to D. D. Atchison.

United States District Court, District of Texas.

The President of the United States of America to the marshal, or any of his lawful deputies of the district of Texas, greeting:

You are hereby commanded to summon Daniel D. Atchison, if he be found in your district, to be and appear before the honorable the United States District Court, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer the petition and complaint of Thomas M. League against Daniel D. Atchison, Eliza A. White, and Abram L. White, in an action of trespass to try title, and for damages in the sum of fifteen hundred dollars, of which you will serve the said defendant, Daniel D. Atchison, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this twelfth [L. S.] day of January, A.D. 1854, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And thereupon indorsed is the marshal's return thereof, which is as follows, to wit:

Marshal's Return.

Received, January 13, 1854, and executed same day, by handing Daniel D. Atchison a true copy of this writ, and the certified copy of petition accompanying the same, in Galveston.

BEN. McCULLOCH,
U. S. Marshal.
By E. T. AUSTIN,
Deputy.

And on the same day and year, a citation was issued herein to the defendant, Eliza A. White, which is in substance as follows, to wit:

Citation to Eliza A. White.

United States District Court, District of Texas.

The President of the United States of America to the marshal, or any of his lawful deputies, of the district of Texas, greeting:

You are hereby commanded to summon Eliza A. White, if she be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the district of Texas, at the city of Galveston, on the first Monday of January next, to answer the petition and complaint of Thos. M. League against Daniel D. Atchison, Eliza A. White, and Abram L. White, in an action of trespass, to try title, and for damages in the sum of fifteen hundred dollars, of which you will serve the said defendant, Eliza A. White, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this twelfth [L. S.] day of January, A.D. 1854, and the seventy-eighth year of the independence of the United States of America.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal, in substance as follows, to wit:

Marshal's Return.

Received 13th January, 1854, and executed same day, by handing Eliza White a true copy of this writ, and the accompanying certified copy of the petition, in Galveston.

BEN. McCULLOCH,
U. S. Marshal.
By E. T. AUSTIN,
Deputy.

And on the same day and year, a citation issued herein to the defendant Abram L. White, which is in words and figures in substance as follows, that is to say:

Citation to Abram L. White.

U. S. District Court, District of Texas.

The President of the United States of America to the marshal, or any of his lawful deputies of the District of Texas, greeting:

You are hereby commanded to summon Abram L. White, if he be found in your district, to be and appear before the honorable the District Court of the United States, at a court to be holden in and for the District of Texas, at the city of Galveston, on the first Monday of January next, to answer the petition and complaint of Thomas M. League against Daniel D. Atchison, Eliza A. White and Abram L. White, in an action of trespass to try title, and for damages in the sum of fifteen hundred dollars, of which you will serve the said defendant Abram L. White with the accompanying copy of said petition.

Witness the Honorable John C. Watrous, judge of said court, and the seal of said court, at the city of Galveston, this twelfth day of January, A.D. 1854, and the seventy-eighth year of the Independence of the United States of America.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal of said writ, in substance as follows:

Marshal's Return.

Received January 13th, 1854, and executed same day, by handing Abram L. White a true copy of this writ and the accompanying copy of the petition, in Galveston.

BEN. McCULLOCH,
U. S. Marshal.
By E. T. AUSTIN,
Deputy.

And afterwards, to wit, on the same day and year, a bond for a writ of sequestration was filed herein, which is in substance as follows, that is to say:

Bond for Writ of Sequestration.

The United States of America, District of Texas.
District Court, at Galveston, to wit:

Know all men by these presents, that we, Thomas M. League as principal, and as sureties, are held and firmly bound unto Daniel D. Atchison, Eliza A. White and Abram L. White, in the just and full sum of three thousand dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this eleventh day of January, A.D. 1854.

The condition of the above obligation is such that whereas the above bound Thomas M. League has commenced an action of trespass to try title to lot number four, in block number four hundred and forty-one, in the city of Galveston, in the District Court for the district aforesaid, at Galveston, against the aforesaid Atchison and Eliza A. White and Abram L. White, and has prayed and asked for a writ of sequestration to sequester the said lot as required by law, having made the affidavit required by the statute in such case made and provided, and such writ is now accordingly issued.

Now the condition of the above obligation is such, that should the said Thomas M. League pay to the said Atchison and Whites all such damages as shall or may be awarded against him, in case it shall be decided that such writ of sequestration was wrongfully sued out and issued. Then this obligation shall be void, else to be and remain in full force and virtue.

THO. M. LEAGUE, [SEAL.]
S. SOUTHWICK, [SEAL.]
B. P. BUCKNER, [SEAL.]

Signed, sealed and delivered
in presence of
JOHN S. JONES.

Approved January 12, 1854.

JAMES LOVE,
Clerk.

And afterwards on the same day and year, a writ of sequestration issued from the clerk's office of said court, in words and figures in substance as follows, that is to say:

Writ of Sequestration.

The United States of America, District of Texas.

The President of the United States to the marshal of the district of Texas, greeting:

Whereas, Thomas M. League has commenced an action to recover the title and possession of lot number four, in block number four hundred and forty-one, against Daniel D. Atchison, Eliza A. White, and Abram L. White, and has made oath that he fears the said Daniel D. Atchison will convert the fruits and revenue of said lot or parcel of land to his own use, and has prayed for a writ of sequestration, commanding the marshal to sequester said lot and appurtenances.

These are, therefore, to command you to seize, sequester, and take into your possession the said lot or parcel of land, together with the hereditaments and appurtenances, and the same to retain and safely keep (repleviable on security), so that the same may be subject to the further order and proceeding of the court. Herein fail not, and due return make of this writ.

[L. S.] Witness the Honorable John C. Watrous, judge of said court, and the seal thereof, at the city of Galveston, this twelfth day of January, A.D. 1854.

JAMES LOVE,
Clerk.

And thereon indorsed is the marshal's return of said writ, which is in substance as follows:

Marshal's Return.

Received January 13th, 1854, and on the same day I went on the premises, and into a house standing on said lot number four, in block number four hundred and forty-one, and first presenting Eliza A. White and Abram L. White, each with a copy of summons, and the petition filed in this case, I read to them this writ of sequestration, and took possession of said lot with all the hereditaments and appurtenances thereunto belonging. Thereupon, the said defendants and Danl. D. Atchison, executed a replevin bond, payable to the plaintiff in this suit, in double the amount of the value of the property, said property being valued at $2001, and the bond being given for $4002, conditioned as the law requires, with good sureties, approved by me, which said bond is returned herewith into court.

GALVESTON, January 13th, 1854.

BEN. McCULLOCH,
U. S. Marshal.
By E. T. AUSTIN,
Deputy.

And afterwards, to wit, on the fourth day of January, of the year of our Lord one thousand eight hundred and fifty-five, came the defendant, D. D. Atchison, and filed his answer herein, in words and figures in substance as follows, that is to say:

Answer of D. D. Atchison.

THOMAS M. LEAGUE
v.
D. D. ATCHISON et al.

United States District Court, District of Texas.

And now comes the defendant, D. D. Atchison, and says, that he is not guilty of the said supposed trespasses laid to his charge, or any, or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, &c.

MERRIMAN & HOWARD,
Pro defendant.

And for a further plea in this behalf, the said defendant says, that he has had peaceable adverse and undisturbed possession of said lot or parcel of ground in plaintiff's petition mentioned, for more than three years next preceding the commencement of this suit, under a regular consecutive chain of title down from the sovereignty of the soil.

And for a further plea in this behalf, the said defendant says, that he has had peaceable, undisturbed, and adverse possession of said lot for more than three years next preceding the institution of this suit under color of title.

And the defendants further answering says, that the said pretended deed from the said Southwick to the said League is null and void in this, that he says, that at the date thereof, and prior thereto, and at all times subsequent thereto, this defendant was in the actual adverse possession of said lot and premises in plaintiff's petition mentioned; and that at the time of the pretended purchase by plaintiff of the premises in controversy, suit was pending in this honorable court against this defendant for the recovery of said premises in the name of E. Augustus Curtiss, under whom plaintiff pretends to claim, and that such purchase was made with full notice of the pendency of said suit, and of defendant's adverse possession, and this he is ready to verify; wherefore he prays, &c.

MERRIMAN, HOWARD,
Attorneys pro defendant.

And afterwards, to wit, on the thirteenth day of February, of the same year, an agreement was filed herein, which is in words and figures in substance as follows, that is to say:

Agreement.

THOMAS M. LEAGUE
v.
D. D. ATCHISON et al. } No. 477.

It is agreed between the counsel for plaintiff and defendants in said cause, that the deposition of Israel G. Hasbrook, heretofore taken and returned to this court in the case of E. Augustus Curtiss against said D. D. Atchison, and on file in said case, which was brought to January term, 1854, of this court, may be used by defendant, and read in evidence on the trial of said cause, No. 477, now pending in said court, as if taken in the case, without objection to form of taking or return.

ROB. HUGHES,
For Plaintiff.

F. H. MERRIMAN,
Attorney for Defendant.

And afterwards, to wit, on the same day and year, a judgment was rendered herein by the court here, which is in form and substance as follows, that is to say:

Judgment.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
No. 477.

On this day came the parties by their attorneys, and on motion of defendant by his attorney, it is ordered that he have leave to withdraw all pleas heretofore filed herein by said defendant, except pleas of the statutes of limitations, and the general issue; and thereupon came a jury of good and lawful men, to wit, Francis B. Whiting, William McDonald, George Nelson, Jesse J. Davis, James Hirams, Jacob Smith, Ira M. Freeman, James Forest, Owen D. Johnson, Aaron Armstrong, William Sanderson, and David Webster, who being elected, tried, and sworn, well and truly to try the issue joined on their oaths, to say, "We, the jury, find for the defendant; George Nelson, foreman." It is therefore considered by the court, that the plaintiff take nothing by his suit, and that the defendant go hence without day, and that he recover of and from the said plaintiff his costs by him about his defence in this behalf expended.

And afterwards, to wit, on the fifteenth day of February of the same year, a motion for a new trial was filed herein, which is in words and tenor in substance as follows, to wit:

Motion for New Trial.

The United States of America.

District of Texas, to wit, District Court, January Term, 1855.

THOMAS M. LEAGUE
v.
D. D. ATCHISON.
Trespass, &c.

The plaintiff moves the court to set aside the verdict, and grant a new trial in this case. 1st. Because the jury found contrary to the evidence. 2d. The verdict is against law. 3d. And there are other causes.

ROB. HUGHES,
For Plaintiff.

And afterwards, to wit, on the sixth day of March, of the same year, the court here made an order in this cause, which is of the form and tenor which follow, that is to say.

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

On this day came on to be heard the motion of the plaintiff to grant a new trial in this cause, and after argument of counsel, as well for the plaintiff as for the defendant, having heard, the court being now sufficiently advised, it is ordered that the said motion be granted.

And afterwards, to wit, on the ninth day of January, of the year of our Lord one thousand eight hundred and fifty-six, an affidavit and motion was filed herein, which is as follows, to wit:

Affidavit and Motion.

In the United States District Court, Galveston. January Term, 1856.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

And now comes Daniel D. Atchison, defendant herein, and says, that he cannot go safely to trial at the present term of court for the want of testimony material to his defence. Said testimony is that of a witness residing at or near Stockton in California.

And affiant was ignorant of the materiality of the testimony of said witness until some time in November last, until which time affiant, in good faith, believed the said witness to be dead, and then casually learned that he was still living, and his residence as above stated. That affiant's attorney herein immediately took such steps as he believed necessary and most certain to secure the deposition of said witness in time for this term of court, by writing to an attorney at law at San Francisco, the nearest point to Stockton, where he or affiant had any legal acquaintance, and requesting him to cause the said deposition to be forthwith taken ex parte under the act of Congress. Affiant is advised and believes that his attorney had every reason to believe, and still believes, that said deposition would be promptly taken. Said attorney in California being a business correspondent of affiant's attorney here, an attentive and reliable lawyer, well acquainted with said witness, and the necessary funds for taking said deposition having been provided; that said deposition has not been returned, nor an answer to said letter received. And affiant believes the failure therein to be owing to the want of sufficient time to obtain said deposition since affiant learned said witness was living.

That affiant has been guilty of no neglect, delay, or want of diligence in his effort to obtain said testimony. That he had heard of the death of said witness, and believed him dead ever since the institution of this suit, and believes the report of his death generally prevails in this community. But learning the contrary, the most careful and efficient steps as he believes were taken, in order and with an anxious desire to procure said testimony by this term of court; and affiant knows no reason for failure therein except want of time.

That the testimony of said witness is of great importance and materiality, and affiant expects to be able to procure the same by the next term of court, and cannot prove the same facts from any other source, and seeks this continuance to defend his just rights, and not for delay.

DANIEL D. ATCHISON.

Subscribed and sworn to in open court January 9th, 1856.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the same day and year, the court here made an order in this cause in form and substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

On motion of the defendant's attorney, and upon affidavit filed, it is ordered that this cause be continued until the next term of this court.

And afterwards, to wit, on the fifteenth day of January, of the year of our Lord one thousand eight hundred and fifty-seven, an affidavit, which said affidavit of court is in form and of the tenor following, that is to say:

Affidavit.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

And now comes the defendant, Daniel D. Atchinson, and says, that he cannot go safely to trial at the present term of court for the want of testimony material to his defence. That the material witness for defendant is E. A. Rhodes, who resides in or near Stockton, California; and affiant expects to prove by said Rhodes, who was the notary public before whom the acknowledgment of the deed made before Hasbrook and wife, which is alike in plaintiff's title, was made, facts and circumstances showing or tending strongly to show that said deed did not contain the name of any grantee, nor did the certificate contain the name of any grantee when said deed was so acknowledged; and said certificate was written by said Rhodes, but that said deed and certificate were in blank, and have been filled up since.

Affiant expects to prove by said Rhodes that it was frequently his practice as notary to receive the acknowledgment of deeds, in which the name of the grantee was left blank, and to leave a blank in his certificate for the insertion of the name of a vendee, and that such was the frequent practice of officers authorized to take acknowledgments at that day. That said Rhodes will further prove his recollection of taking such acknowledgments and making such certificates in cases in which P. G. Merritt was concerned or interested in the transaction; and that although the said witness will not swear to his remembrance of this identical deed, he will swear that to his best recollection and belief that he never heard of E. Augustus Curtiss as a purchaser of property in Galveston, and thinks he would remember it if he had been the grantee named in said deed.

Affiant further says, that prior to the last term of this court, his attorney wrote to California to inquire what proof said Rhodes would make, and directed the taking of his deposition, if found that it would be of service to affiant, as affiant believed it would be.

That the instructions were not received in time to take said deposition at the last term; and the attorney who had been written to on the subject, wrote in reply, that the foregoing facts would be proved by said Rhodes; and if deemed useful, his deposition would be taken under the act of Congress.

That affiant's attorney at once wrote to said attorney in California, to have said deposition taken, and made the necessary provision therefor, as to funds for the purpose.

That some time thereafter, said attorney in California wrote that he had not then been able to see said Rhodes, but expected to do so soon. This was during the summer, or early in the fall.

That affiant's attorney has since written twice, urging said deposition to be taken; but has received no advice, nor has affiant why it was not taken. And affiant is wholly ignorant whether said deposition has been taken and miscarried; and if not taken, what is the cause thereof, unless it be the fact that said attorney in California, has within a few months past, been engaged in editing a newspaper, and in the violent excitement in that country may have neglected to attend to the business. Affiant has expected, by each mail from California, to receive said deposition.

Affiant says that he has every reason to rely on the attention to the taking of said deposition, by said attorney in California, and had no acquaintance there, and knew no means of procuring said deposition that he considered better adapted to the object.

Affiant believes that he can procure said deposition by the next term of court, and hereby agrees to enter into stipulation for trial next term.

That he knows no witness by whom he can prove the same facts. That he does not ask a continuance for delay, but has done all in his power, in good faith and with an anxious desire to be ready for trial at this term, and should a continuance be refused him, fears that great and irreparable injustice will be done him.

DANIEL D. ATCHISON.

Subscribed and sworn to before me, July 15th, 1857.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the 27th day of February, of the same year, the court here made an order in this cause, which is in form and substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

And on this day came the defendant, and upon his motion upon affidavit filed, it is ordered that this cause be continued until the next term of this court.

And afterwards, to wit, on the eighth day of May, of the same year, came the defendant herein, and filed his motion for a continuance, with affidavit in words and tenor as follows, to wit:

Affidavit of Defendant.

United States District Court, Galveston.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. }

The defendant, Daniel D. Atchison, on oath says, that he cannot go safely to trial at this term of court, for want of the material testimony of E. A. Rhodes, who resides near Stockton, in California, and is a necessary witness in his defence.

And this affiant refers to his affidavit in this cause, on the 15th January, 1857, on file among the papers herein, and says that the matters therein stated are true, and he makes said affidavit a part of this affidavit.

Affiant further says, that a continuance of this cause was granted by this court at its last term, based on said affidavit, and this affiant expected, in good faith, to be ready for trial at the then next term of court, and to be bound therefor.

That since this continuance was granted, the present term of this court has been required by law to be held, which was wholly unexpected by affiant, and to which he had no reference. That since intelligence thereof reached this place, it has not been possible, by the use of any diligence whatever in the power of affiant and his attorneys to procure said testimony, for the want of sufficient time for that purpose. Affiant refers to the affidavit of his attorney herein, to show the diligence actually used.

Affiant expects to prove, by said Rhoades, facts showing or tending strongly to show, that the pretended deed from Hasbrook and wife to E. Augustus Curtiss, which was a link in plaintiff's title, was executed, delivered, acknowledged, and certified in blank, and without the nume of any grantee therein, and that the name of E. Augustus Curtiss was afterwards inserted by said Merritt, and is that of a fictitious, and not of any real person.

Affiant cannot prove the same facts from any other source. He believes he will be able to procure said testimony by the next term of court, and submits to a peremptory rule of trial at next term, asking a continuance at this not for delay, but that justice may be done.

DANIEL D. ATCHISON.

Subscribed and sworn to before me, 7th May, 1857.

JAMES LOVE,
Clerk.

And on the same day and year, an affidavit was filed herein, by the defendant, in words and tenor in substance as follows, to wit:

Affidavit of Defendant.

District Court of the United States, Eastern District of Texas, at Galveston.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.

The defendant, Daniel D. Atchison, makes oath and says, that he believes the original of the pretended power of attorney from E. Augustus Curtiss to Henry S. Garlick, a certified copy of which was filed by plaintiff, on the 18th January, 1855, is forged in this, to wit, that the signature purporting to be that of said Curtiss to said original, is a forgery.

Affiant further says, that at the time of the institution of this suit, the said original power was on file in the records of the Brazeria District Court, but has been since withdrawn, as affiant is informed and believes, by an attorney of plaintiff in this suit. And affiant further believes and avers, that since the filing of said copy, it has been within the power of plaintiff to procure the original, and he now gives notice for its production.

DANIEL D. ATCHISON.

Subscribed and sworn to before me, 6th May, 1857.

JAMES LOVE,
Clerk and Com.

And on the same day and year, W. P. Ballinger, attorney for defendant, filed his affidavit herein, which is in words and tenor as follows, to wit:

Affidavit of W. P. Ballinger.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

W. P. Ballinger on oath says, that the attorney and agent employed in California, to procure the deposition of E. A. Rhoades, as mentioned in the affidavits of defendant Atchison, was W. H. Rhoades, Esq., attorney-at-law, San Francisco, and affiant knows that proper instructions were given to him, and proper provision made in order to take said deposition; and affiant knew no person in California he considered so likely to attend to said business, and knew no other means of procuring said deposition which seemed more effective. Affiant further says, that some time in February, he received a letter from said Rhoades (W. H.), advising that he would proceed to take the deposition of said E. A. Rhoades, but that under the act of 1790, it was necessary that notice should be given to plaintiff of the time and place of taking the same; and when this was done, the deposition would be taken accordingly.

And affiant says that said Rhoades was mistaken in the requirement of the law, although affiant believed that instructions as to the form and manner of taking depositions under the act of Congress, had been given with such accuracy that no mistake could arise. And affiant says that at the time of the receipt of said letter he was engaged in the trial of the Christy cases in this court, the character of which is known to the court, and which continued until the 24th February. That affiant was also engaged in other business in this court, and the Supreme Court, which closely occupied his time. That, not anticipating a session of this court until the term in January, affiant did not immediately write to said Rhoades or give him further information, desiring to do so fully and carefully, for which he had not the leisure.

But that by the first mail after the receipt of news of the change of courts, affiant did give the necessary information and instructions to said Rhoades to procure said deposition, although he did not believe that there was sufficient time until the sitting of the court, and sufficient time has not elapsed.

Affiant says in good faith and upon his personal knowledge of the facts of the case, that there has been no want of diligence on the part of the defence in this case, and that the testimony of said Rhoades he believes most material to the defence, and that it will be procured by the next term of court.

W. P. BALLINGER.

Subscribed and sworn to before me, 8th May, 1857.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the same day and year, the court made an order in this cause, which is in words and tenor in substance as follows:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
No. 477.

On motion of defendant and upon his affidavit filed, it is ordered that this cause be continued until the next term of this court.

And afterwards, to wit, on the fourth day of June of the same year, the court here made an order in this cause, in form and substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
No. 477.

On motion of defendant's attorney, it is ordered that defendant have leave to withdraw the deed on file in this cause, from Hasbrook and wife to E. A. Curtiss, upon leaving a certified copy of the same in the clerk's office.

And afterwards, to wit, on the thirteenth day of July, of the year of our Lord one thousand eight hundred and fifty-eight, the court here made an order in this cause, which is as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
No. 477.

By agreement of parties by their counsel, and for cause shown, it is ordered that this cause be continued until the next term of this court.

And afterwards, to wit, on the thirtieth day of July of the same year, came the plaintiff and filed his motion herein, in words and figures as follows, that is to say:

Motion of Plaintiff.

District Court of the United States, E. District of Texas, at Galveston.

THOMAS M. LEAGUE
v.
D. D. ATCHISON.

The plaintiff by his attorneys, referring to the replevy bond given by the defendant after the sequestration of the property in litigation, and offering to prove to the court that the sureties on said bond are entirely insufficient for the amount stated in the penalty of the bond or the value of the property, now moves the court, after due consideration, to order the defendant to furnish another bond with additional sureties, conditioned as provided by law, by a certain time to be fixed by the court, and that upon his failure so to do, an alias writ of sequestration issue, requiring the marshal again to take possession of the said property.

ALLEN & HALE,
Attorneys for Plaintiff.

And service thereof by the marshal is indorsed herein, as follows:

Service of Motion.

Received July 30th, 1858, and not finding D. D. Atchison I served Wm. P. Ballinger, his attorney, with a true copy hereof on the same day.

BEN. McCULLOCH,
U. S. M.
By J. A. H. CLEVELAND,
Deputy.

And afterwards, to wit, on the third day of August of the same year, the defendant filed his motion herein, in tenor and substance as follows:

Motion to Quash Sequestration.

U. S. District Court, Eastern District of Texas, at Galveston.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON and others.

Now come the defendants, by attorneys, and move the court to quash the sequestration issued in this case, on the following grounds.

1st. That plaintiff's affidavit shows no good and sufficient cause of sequestration.

2d. That the affidavit of plaintiff is not positive and certain, but is on information and belief.

3d. The facts stated in the petition are not sworn to, and there are no facts sworn to to authorize the issuance of a sequestration.

4th. And for other causes which appear on the record.

THOMPSON & BALLINGER,
For Defendant.

We acknowledge service of the above motion, August 3d, 1858.

ALLEN & HALE,
Attorneys for Plaintiff.

And afterwards, to wit, on the fourth day of August, of the same year, the court here made an order in this cause, which is in form and tenor in substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v. No. 477.
DANIEL D. ATCHISON et al.

On this day came the parties by their attorneys, and thereupon came on to be heard the motion of the defendants heretofore filed, to quash the sequestration herein. And after argument of counsel heard, it is ordered, that said motion be sustained, and said sequestration quashed. And thereupon the plaintiff asked leave to annex his petition, which was granted.

And afterwards, to wit, on the fifth day of August, of the same year, came the plaintiff and filed his amended petition herein, in words and tenor as follows, that is to say:

Amended Petition.

The United States of America, Eastern District of Texas, to wit:

District Court at Galveston, July Term, 1858.

THOMAS M. LEAGUE *v.* DANIEL D. ATCHISON, ELIZA A. WHITE, and ABRAM L. WHITE.	Trespass to try title, &c.

And now comes the plaintiff, by his attorneys, and by leave of the court first had and obtained, amends his petition herein by inserting in the same, on the last page thereof, in the third line, between the words "petition" and "wherefore," the following, to wit:

And your petitioner states that by the averments and statements herein, he intended to aver and state, and now avers and states, that your petitioner had, and has a right in fee, to the lot and premises herein set out and described, which gave him a right of entry, as he is advised, upon and into the same, and that on the day and year aforesaid, to wit, on the 1st day of January, 1854, the defendant Daniel D. Atchison, wrongfully setting up a claim and title to said premises, then had possession thereof, by the other defendants Eliza A. and Abram L. White, or one of them, who held and possessed the same under and as the tenant or tenants of said Atchison.

And your petitioner further, by leave of the court first had and obtained, and by way of supplement to his said petition, says, that since the filing said petition, the said Eliza and Abram L. White have surrendered the possession of the said lot and premises to the said defendant Atchison, and they are no longer the tenants of the said Atchison, and from the time of the surrender aforesaid; and now, the said Atchison has, by himself, and others for him, had and held the possession, use, and enjoyment of said lot and premises, and withheld the possession, use, occupation, and enjoyment thereof from your petitioner, to his great injury and damage, to the extent in his said petition complained of; and he prays compensation in damages for the said possession, use, occupation, and enjoyment of said lot and premises, by the said Atchison and those claiming under him, and he prays sequestration upon the statements, averments, and charges of the said petition as amended, and this supplement thereto, and he further prays as in and by his said petition he has already prayed, &c.

ROBERT HUGHES, and
HALE & ALLEN,
For Plaintiffs.

The United States of America, Eastern District of Texas, to wit:

This day Thomas M. League personally appeared before me, a commissioner of affidavits and bail in civil causes, in the courts of the

United States, duly appointed, and made oath in due form, that the averments, statements, and charges, made and contained in the original petition above referred to as now amended, and as in the above supplement contained, so far as made upon information he believes to be true, but when not so made are true in point of fact. And affiant further upon his oath states, that he fears that the said defendant Atchison, who is in possession of the lot and premises sued for in this action, will convert the fruits and revenue produced by the said lot and premises to his own use.

THOS. M. LEAGUE.

Sworn and subscribed before me this 4th day of August, 1858.

JOHN S. JONES,
U. S. Commissioner.

And afterwards, to wit, on the same day and year, came the plaintiff, and filed his bond herein for a sequestration, which is in words and tenor in substance as follows, that is to say:

Bond for Sequestration.

Know all men by these presents, that we, Thomas M. League, Thomas I. League, and Clinton Wells, are held and firmly bound unto Daniel D. Atchison in the just and full sum of ten thousand dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 5th day of August, A.D. 1858.

The condition of the above obligation is such that, whereas the said Thomas M. League has heretofore filed his petition in the District Court of the United States for the Eastern District of Texas, at Galveston, against Daniel D. Atchison, Eliza A. White, and Abram L. White, for the purpose of recovering damages for the trespass to, and try the title of, in and to, a certain lot of ground in the city of Galveston, being known and designated on the map or plan of said city, as lot four, in block four hundred and forty-one, and has filed on this day an amendment and supplement to his said petition, and prays a writ of sequestration against said lot, upon the grounds stated in his affidavit for that purpose, and the said sequestration has issued. Now should the said Thomas M. League pay to the said Daniel D. Atchison all and such damages as shall be awarded against him in case it shall be decided that such sequestration was wrongfully issued, then this obligation to be void, else to remain in full force and virtue.

THOMAS M. LEAGUE, [L. S.]
T. I. LEAGUE, [L. S.]
C. G. WELLS, [L. S.]

Signed, sealed, and delivered in the presence of the

JAMES LOVE,
Clerk.

And afterwards, to wit, on the ninth day of August of the same year, a writ of sequestration issued herein, which is in words and tenor in substance as follows, that is to say:

Writ of Sequestration.

The United States of America, Eastern District of Texas.

The President of the United States to the marshal of the Eastern District of Texas, greeting:

Whereas Thomas M. League has commenced an action to recover the title and possession of lot number four, in block number four hundred and forty-one, against Daniel D. Atchison, Eliza A. White, and Abram L. White, and has made oath that he fears that said defendant Atchison, who is in possession of the lot and premises sued for in this action, will convert the fruits and revenue produced by said lot and premises to his own use, and has prayed for a writ of sequestration commanding the marshal to sequester said lot and premises.

These are therefore to command you to seize, sequester, and take into your possession the said lot or parcel of land, together with the hereditaments and appurtenances, and the same to retain and safely keep (repleviable on security) so that the same may be subject to the further order and proceeding of the court. Herein fail not, and due return make of this writ.

[L. S.] Witness the Honorable John C. Watrous, judge of said court, and seal thereof, at the city of Galveston, this 9th day of August, A.D. 1858.

JAMES LOVE,
Clerk.

And thereupon indorsed is the return of the marshal in words and figures in substance as follows, to wit:

Marshal's Return.

Received on the 9th day of August, A.D. 1858, and on the 11th day of said month and year thereafter, I executed this writ, by levying, attaching, and taking into my possession lot number four, in block number four hundred and forty-one, situated in the city of Galveston, Eastern District of Texas, together with all the buildings thereon situated and appurtenances thereunto belonging, and on the 14th day of August, 1858, the defendant Daniel D. Atchison presented me a bond herewith, approved and filed, with good and sufficient securities thereto, and I thereupon released into his possession the said property, lot number four, in block number four hundred and forty-one, and all the appurtenances belonging thereto.

BEN. McCULLOCH,
U. S. Marshal.
By J. A. H. CLEVELAND,
Deputy.

And afterwards, to wit, on the sixteenth day of August of the same year, a replevin bond was filed herein by the defendant, which is in words and tenor as follows, that is to say:

Replevin Bond.

Know all men by these presents that we, Daniel D. Atchison, of the city of Galveston, and State of Texas, as principal, and R. K. Hartley, John W. Harris, and William P. Ballinger, as sureties, are held and firmly bound, jointly and severally, unto Thomas M. League, of the city of Galveston, in the penal sum of five thousand dollars, to be paid to the said Thomas M. League, his heirs, executors, administrators, and assigns; for the faithful payment whereof we bind ourselves, our heirs, executors, and administrators, and assigns, firmly by these presents, sealed with our seals, using scrawls by way of seals, and dated this twelfth day of August, A.D. 1858.

Whereas a writ of sequestration issued from the office of the clerk of the District Court of the United States for the Eastern District of Texas, at Galveston, on the ninth day of August, A.D. 1858, in a certain suit pending in said suit wherein Thomas M. League is plaintiff, and Daniel D. Atchison, Eliza A. White, and Abram L. White, are defendants, commanding the marshal of said district to sequester and take into his possession lot number four, in block number four hundred and forty-one, in the said city of Galveston, with the hereditaments and appurtenances; and whereas the said marshal, in obedience to said writ, did, on the eleventh day of August, A.D. 1858, sequester the said lot, hereditaments, and appurtenances; and whereas the said Daniel D. Atchison is now in possession of the said lot, claiming it as his property, and desires to replevy the same, and has offered the said as his sureties, who have been accepted as good and sufficient.

Now, therefore, the condition of the above obligation is such that if the said Daniel D. Atchison will not injure the said property, to wit, the said lot, hereditaments, and appurtenances, and will restore the fruits and revenue produced by the same, or pay their value, in case he shall be commanded so to do, then this obligation to be void, otherwise to remain in full force and virtue.

DANL. D. ATCHISON, [L. S.]
R. K. HARTLEY, [L. S.]
JOHN W. HARRIS, [L. S.]
W. P. BALLINGER. [L. S.]

The State of Texas, County of Galveston.

Be it remembered that on this thirteenth day of August, A.D. one thousand eight hundred and fifty-eight, before me, E. P. Hunt, a notary public for Galveston county, commissioned and sworn, personally came John W. Harris and Danl. D. Atchison, to me personally known, and acknowledged that they executed the above bond, for the purposes and uses therein stated.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office, at the city of Galveston, this day and year above written.

E. P. HUNT,
Notary Public.

And afterwards, to wit, on the tenth day of January, of the year of our Lord one thousand eight hundred and fifty-nine, came the defendant, and filed his motion herein to quash the sequestration, which is as follows, that is to say:

Motion to Quash Sequestration.

United States District Court, Galveston.

LEAGUE
v.
ATCHISON.

The defendant moves the court to quash the sequestration herein, because neither the petition, amended petition, or the matters in either contained, are sworn to, nor are any sufficient matters sworn to to authorize taking out a writ of sequestration. 2d. The affidavit is not positive, nor in the terms required by law. And defendant further moves that the costs on the sequestrations herein be taxed against the plaintiff.

THOMPSON & BALLINGER,
Defendant's Attorneys.

And on the same day and year came the plaintiff, and filed his motion herein, in form and substance as follows, that is to say:

Motion of Plaintiff's.

District Court of the United States, E. District of Texas, at Galveston.

THOMAS M. LEAGUE
v. } No. 477.
D. D. ATCHISON et als.

The plaintiff, desiring to call S. Southwick as a witness, moves the court to permit him, if the court shall think it necessary to give other sufficient security, instead of said Southwick, to be approved by the court.

And on the eleventh day of January, of the same year, came the plaintiff, and filed his demurrer herein, in form and substance substantially as follows, that is to say:

Demurrer.

District Court of the United States, E. Dist. of Texas, at Galveston.

THOMAS M. LEAGUE *v.* D. D. ATCHISON et als.	No. 477.

And now comes the plaintiff, by his attorneys, and demurs to the last plea in said defendants' answer contained, and says that it is not sufficient in law, and here assigns the following cause of demurrer: That a conveyance of land in adverse possession is not, by the law of Texas, void or inoperative. Wherefore the plaintiff prays judgment, &c.

ALLEN & HALE,
For Plaintiff.

And on the same day and year the court here made an order in this cause, which is as follows, to wit:

Order of Court.

THOMAS M. LEAGUE *v.* DANIEL D. ATCHISON.	No. 477.

On this day came the parties by their attorneys, and thereupon came a jury of good and lawful men, viz., James Huckins, W. D. C. Hall, Howard M. Baker, R. D. Johnson, C. B. Adams, Charles Weidenmiller, Philip Saunders, William T. Saunders, William J. Hancock, Wright S. Sleeper, Henry Bentick, and Malcolm K. Hunter, who being elected, tried, and sworn well and truly to try the issue joined.

And thereupon came on to be heard the motion of defendant to quash the sequestration heretofore granted in this cause. After argument of counsel had been heard for defendants, as well as plaintiff, and the court being sufficiently advised, it is ordered that the motion be overruled.

And thereupon came on to be heard the motion of plaintiff to release Stephen Southwick, one of the sureties of plaintiff, on the bond of sequestration filed in this cause, and substitute in his room and stead good and sufficient security. And the court being fully advised, it is ordered that the said Stephen Southwick be released from all liability upon said bond, upon the execution by plaintiff of a bond with good and sufficient security in the room and stead of said Southwick. And thereupon the plaintiff filed a bond with T. J. League as surety, which was approved.

And thereupon came on to be heard the demurrer of plaintiff to the last plea of defendant in his defence pleaded. After argument of counsel, and the court being fully advised, because the law is for the plaintiff, it is ordered that the demurrer be sustained, and that the said last plea of defendant be stricken out. And having made some progress in the cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twelfth day of January of the same year, the court here made an order in this cause, which is in form and substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
} No. 477.

Further progress having been made in this cause, and not having time to go through the same, the jury, by consent, were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the thirteenth day of January of the same year, the court here made an order in this cause, in form and substance as follows, namely:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
} No. 477.

After further progress in this cause, and not having finished the same, by consent of parties, the jury were permitted to disperse until the calling of the cause to-morrow morning.

And afterwards, to wit, on the fourteenth day of January of the same year, the plaintiff filed a sequestration bond herein, which, in form and substance, is as follows, to wit:

Sequestration Bond.

The United States of America, Eastern District of Texas.

Know all men by these presents, that we, Thomas M. League, as principal, and Thomas J. League, as surety, are held and firmly bound unto Daniel D. Atchison, Eliza A. White, and Abram L. White, in the just and full sum of three thousand dollars, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this twelfth day of January, A. D. 1859.

For that, whereas the above bounden Thomas M. League has commenced an action of trespass to try title, to lot number four, in block number four hundred and forty-one, in the city of Galveston, in the District Court for the district aforesaid, at Galveston, against Daniel D. Atchison, Eliza A. White, and Abram L. White, and given, heretofore, to wit, on the eleventh day of January, A. D. 1854, a bond for a sequestration, signed by said Thomas M. League as principal, and Stephen Southwick and B. P. Buckner as sureties, and has also sued out a writ of sequestration thereon, which issued on the twelfth day of January, A. D. 1854, which was afterwards quashed by order of the court: and whereas the said Thomas M. League, plaintiff, desires to call the said Southwick as a witness upon the trial of said action, and has obtained an order of court, authorizing him to substitute, in place of said bond, other good and sufficient security to be approved by the court; and whereas, it is now the desire of said Thomas M. League, to substitute in place of said bond, another similar bond, with Thomas J. League as surety.

Now, therefore, the condition of the above obligation is such, that should the said Thomas M. League, pay to the said Atchison and White's, all such damages as have been sustained or may be sustained, all such damages as shall, or may be awarded against him, in case it shall be decided that such writ of sequestration was wrongfully sued out and issued, then this obligation shall be void, else to be and remain in full force and virtue.

THO. M. LEAGUE, [L. S.]
T. J. LEAGUE, [L. S.]

Signed and sealed, the day
and year above written,
in presence of
JO. EVE LOVE.
Approved.

JAMES LOVE,
Clerk.

And afterwards, to wit, on the same day and year, the court here made an order in this cause which is in form and substance as follows, that is to say:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON.
No. 477.

After further progress in this cause, and not having finished the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the fifteenth day of January of the same year, the court here made an order in this cause, which is in form and substance as follows: namely,

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

After further progress in this cause, and not having time to go through the same; by consent of parties the jury were permitted to disperse, until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-fifth day of January of the same year, the court here made an order in this cause, which is in form and substance as follows: namely,

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, by consent of parties the jury were permitted to disperse, until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-sixth day of January of the same year, the court here made an order in this cause, which is in form and substance as follows, that is to say:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-seventh day of January of the same year, the court here made an order in this cause, which in form and substance is as follows, that is to say:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-eighth day of January of the same year, the court here made an order in this cause, which is in form and substance as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, the jury by consent of parties were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the twenty-ninth day of January of the same year, the court here made an order in this cause, which in form and substance is as follows, that is to say:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, the jury by consent of parties were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the thirty-first day of January of the same year, the court here made an order in this cause, which is in form and substance substantially as follows, viz.:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

The jury having made further progress in this cause, and not having time to go through the same, it is ordered by consent of parties that the jury be permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the first day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, that is to say:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the second day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON. } No. 477.

Further progress having been made in this cause, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the third day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, viz.:

Order of Court.

THOMAS M. LEAGUE
v.
D. D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, the jury by consent of parties were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the fourth day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, viz.:

Order of Court.

THOMAS M. LEAGUE
v.
D. D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, the jury by consent of parties were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the fifth day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, viz.:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the seventh day of February of the same year, the court here made an order in this cause, which in substance and form is as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the eighth day of February of the same year, the court here made an order in this cause, which in form and substance is as follows, to wit:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

And afterwards, to wit, on the ninth day of February, of the same year, the court here made an order in this cause, which in form and substance is as follows, namely:

Order of Court.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

Further progress having been made in this cause, and not having time to go through with the same, by consent of parties the jury were permitted to disperse until to-morrow.

And afterwards, to wit, on the tenth day of February, of the same year, the court here entered a judgment in this cause, in form and substance substantially as follows, viz.:

Judgment.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No. 477.

The jury in this cause, after receiving the charge of the court, retired to consider of their verdict. And after some time, returned into court the following verdict, viz.: "We, the jury, find for the defendants. James Huckins, foreman." It is, therefore, considered by the court that the defendants go hence without day, and recover of the plaintiff one hundred and nineteen dollars and fifty cents, their costs about their defence, in this behalf expended, for which execution may issue.

And afterwards, to wit, on the same day and year, came the plaintiff and filed his bill of exceptions herein, which said bill is in words and figures in substance as follows, viz.:

Bill of Exceptions.

THOMAS M. LEAGUE
v.
DANIEL D. ATCHISON et al. } No.

District Court of the United States, Eastern District of Texas, at Galveston. December Term, 1858.

Be it remembered, that on the trial of this cause at the present term, the plaintiff, to sustain the issues on his part, gave in evidence the following deeds, as showing his derivation of title, to wit: a deed from James Love, Peter J. Menard, and Samuel M. Williams to Phineas G. Merritt, dated September 10th, 1841; a deed from Phineas G. Merritt to Hosea J. Levis, dated March 4th, 1842; a power of attorney from H. J. Levis to Moro Phillips, dated March 4th, 1842; a deed from H. J. Levis, by Phillips, to Stacy B. Lewis, dated February 19th, 1846; a deed from S. B. Lewis to Francis R. Cobb, dated March 16th, 1846; a deed from F. R. Cobb and wife to J. G. Hasbrook; a deed from J. G. Hasbrook and wife to E. A. Curtiss; a power of attorney from E. A. Curtiss to H. S. Garlick; a deed from E. A. Curtiss, by Garlick, to Stephen Southwick; a deed from S. Southwick to the plaintiff, which several deeds are as follows:

Deeds.

[City Company to P. G. Merritt, Merritt to Lewis, Levis power of attorney to Phillips, Levis by Phillips to Lewis, and Lewis to Cobb.]

Republic of Texas, County of Galveston.

This indenture, made and entered into this tenth day of September, in the year one thousand eight hundred and forty-one, between James Love, Peter J. Menard, Samuel M. Williams, the board of directors of the Galveston City Company of the one part, and P. G. Merritt of the other part, witnesseth: that the said directors as aforesaid, having by their acknowledged agent heretofore held a sale at public auction of lots in the city of Galveston, at and before which sale it was proclaimed and made known that the blocks or squares represented on the plan of said city were of the dimensions of three hundred feet by two hundred and sixty feet, with an alley of twenty feet wide in the centre, and were divided in fourteen lots each, the numeration of which commenced with lot number one, at the northwest corner of every block, and was continued on the north front up to number seven, and on the south front from east to west from number eight to fourteen, each lot having a front of forty-two feet ten inches, with a depth of one hundred and twenty feet, except lots number one and fourteen, which have each forty-three feet front; and that the said company expressly reserved to itself the right of laying out other lots and squares, with streets and alleys, on the north front of said city, up to the channel of the bay, in conformity with the general plan exhibited at the sale. And the said P. G. Merritt having become the purchaser of the lots hereinafter described, the directors as aforesaid do hereby, for and in consideration of the sum of two thousand one hundred and seventy-five dollars, to their agent paid by the said P. G. Merritt, the receipt whereof is hereby acknowledged, and by virtue of the rights and powers in them vested as such board of directors of the Galveston City Company, have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey unto the said P. G. Merritt, his heirs and assigns, all the certain lots or parcels of land situate, lying, and being in the city and county of Galveston, and Republic of Texas, and known, designated, and described on the plan of said city as lots numbers one (1), in block number five hundred and sixty (560); lot number four (4), in block number three hundred and eighty-one (381); and lot number four (4), in block number four hundred and forty-one (441). To have and to hold the above described lots and parcels of land, together with all and singular the hereditaments and appurtenances belonging unto the said P. G. Merritt, his heirs and assigns, forever; and said board of directors of Galveston City Company as aforesaid, hereby covenant to and with the said P. G. Merritt, to warrant and forever defend the above described lots or parcels of land to him, his heirs, and assigns, against all persons whatever claiming or to claim the same or any part thereof, by, through, or under them. In witness whereof, said directors have hereunto set their hands and seals, the day and year first above written.

JAMES LOVE, [L. S.]
P. J. MENARD, [L. S.]
SAMUEL M. WILLIAMS. [L. S.]

G. BORDEN, JR.,
Agent.

Republic of Texas, County of Galveston.

This day personally appeared before me, Oscar Farish, clerk of Galveston county court, James Love, P. J. Menard, and Samuel M. Williams, directors of the Galveston city company, who acknowledged the foregoing instrument of writing to be their act and deed as directors aforesaid, for the purposes aforesaid, therein confessed and contained.

Given under my hand, this 15th September, 1841.

Teste, OSCAR FARISH,
C. C. G. C.

Filed 21st September, 1841, 9 A.M.
Recorded 22d September, 1841, 9 A.M.

Republic of Texas, Galveston County.

This indenture, made this fourth day of March (1842), eighteen hundred and forty-two, between Phineas G. Merritt and Hosea J. Levis, both of said county, witnesseth: that the said Phineas G. Merritt, for and in consideration of the sum of four thousand two hundred and fifty dollars, to him in hand paid by the said Hosea J. Lewis, the receipt whereof is hereby acknowledged at and before the sealing and delivery of these presents, he hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, alien, and convey unto the said Hosea J. Lewis, his heirs, executors, administrators, and assigns, the following described lots or parcels of land, lying and being situate in the city of Galveston, in the county aforesaid, known and distinguished on the plan of said city, as lots number four, in block number four hundred and forty-one; lot number two, in block number six hundred and twenty-two; lot number one, in block number five hundred and sixty; lot number four, in block number three hundred and eighty-one; lot number fourteen, in block five hundred and fifty-eight; to the plan of which said city, reference is here made for a particular description of their position.

To have and to hold the said lots of land, to him the said Hosea J. Levis, his heirs, executors, and assigns, forever, in fee simple, together with all and singular, the rights, numbers, buildings, appurtenances, and improvements, to the same belonging or in anywise appertaining; and I, the said Phineas G. Merritt, for myself, my heirs, executors, and administrators, unto the said Hosea J. Levis, his heirs, successors, and assigns, will forever warrant and defend the title to the said lots or parcels of land, against myself and themselves, and against all and every other person or persons; in evidence whereof, the said Phineas G. Merritt, signs, seals, and delivers this instrument as his act and deed for the purposes therein mentioned, the day and date first above written.

P. G. MERRITT. [L. S.]

MORO PHILLIPS,
OSCAR FARISH.

Acknowledged by P. G. Merritt, and witnessed by Moro Phillips and Oscar Farish, 13th April, 1843.

Teste, OSCAR FARISH,
C. C. G. C.

This day P. G. Merritt appeared before me, and acknowledged the foregoing instrument to be his act and deed for the purposes therein set forth.

Given under my hand, this 4th May, 1842.

Teste, OSCAR FARISH,
C. C. G. C.

Filed 4th May, 1842, 10 A.M.
Recorded 4th May, 1842, 12 M.

Republic of Texas, County of Galveston.

Be it known, that on this fourth day of March, in the year of our Lord one thousand eight hundred and forty-two, that I, Hosea J. Levis, of the city of Galveston, county of Galveston, Republic of Texas, have made and appointed, and by these presents do make, nominate, ordain, authorize, constitute, and appoint in my place Mr. Moro Phillips, of the city of Galveston, to be my true and lawful attorney, in fact general and special, giving and by these presents granting unto the said attorney, full power and authority to conduct, manage, and transact all and sngular, my affairs, business, in the Republic of Texas, of whatsoever nature and kind, without exception, to sell, transfer, and convey, or to mortgage and effect all or any part or parts of the real, personal, or mixed estate of me in this republic; or to lease, let, and hire all or any of my houses, property, or slaves, and to receive and receipt the rent or wages thereof, as the same shall fall due, and for the full execution of the purposes aforesaid, to make, sign, and execute in my name, all acts, whether of sale, mortgage, lien, release, contract, compromise, covenant, or otherwise, that shall or may be requisite and necessary, and bind myself as firmly thereby as if the same were or had been my own proper acts and deeds; and I hereby vest my said attorney with full power of substitution and revocation, in case he should leave the Republic of Texas for any time, authorizing him to revocate said substitution at any time he thinks proper, and resubstitute or act himself; and I, the said Levis, hereby agree to ratify and confirm all the said attorney shall lawfully do or cause to be done by virtue of this act of procuration. Thus done and passed at Galveston, the day and year aforesaid. In witness whereof, I have signed my name and affixed my seal.

H. J. LEVIS. [L. S.]

Witness:
CHAS. W. PRINCE.

This day Charles W. Prince appeared before me, and being duly sworn, deposeth and saith, that H. J. Levis signed and executed the within instrument in his presence, and that he subscribed his name as a witness thereto.

Given under my hand, this 9th March, 1842.

Teste, OSCAR FARISH,
C. C. G. C.

Filed March 9th, 1842, at 8 A.M.
Recorded same day, at 3 P.M.

OSCAR FARISH,
C. C. G. C.

Republic of Texas, County of Galveston.

This indenture, made and entered into this nineteenth day of February, in the year one thousand eight hundred and forty-six, between Hosea J. Levis, of the one part, and Stacy B. Lewis, of the city of Galveston, of the other part, witnesseth: that the said Levis, for and in consideration of the sum of one thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged, has this day granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, and convey unto the said Lewis, his heirs and assigns, all that certain lot or parcel of ground situate, lying, and being in the city of Galveston and county of Galveston, and known on the map of said city as lot number four (4) in block number four hundred and forty-one, with the buildings and improvements thereon. To have and to hold said lot or parcel of ground as above mentioned, with all the hereditaments and appurtenances thereunto belonging to him the said Lewis, and his heirs, &c., and to and for their own proper use, and benefit, and behoof, forever; and the said Lewis, for himself, his heirs, executors, and administrators, covenants with the said Lewis, to warrant and forever defend the title to the said property to him the said Lewis, his heirs, &c., forever, free from the claim or claims of all persons claiming or to claim the same or any part thereof, and declares that at and until the signing and executing this instrument, the said lot and premises are free of all mortgage or other incumbrance whatsoever. In witness whereof, the said Levis hereto subscribes his name, the day and date above written.

H. J. LEVIS.
By his att'y in fact,
MORO PHILLIPS. [L. S.]

Witness,
OSCAR FARISH,
W. R. B. WILLS.

This day H. J. Levis, by his attorney in fact Moro Phillips, and acknowledged the foregoing and written instrument to be his act and deed for the purposes therein set forth. Given under my hand, February 20th, 1846.

Teste, OSCAR FARISH,
C. C. G. C.

Filed February 20th, 1846, at 11 A.M.
Recorded February 21st, 1846, at 1 P.M.

State of Texas, County of Galveston.

This indenture, made and entered into this sixteenth day of March, in the year one thousand eight hundred and forty-six, between Stacy B. Lewis of the one part, and Francis R. Cobb, of the city of Galveston, of the other part, witnesseth: that the said Stacy B. Lewis, for and in consideration of the sum of twelve hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged, has this day granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said Cobb, his heirs and assigns, all that certain lot or parcel of ground situate, lying, and being in the city of Galveston, and county of Galveston, and known on the map of said city as lot number four (4) in block number four hundred and forty-one, with the buildings and improvements thereon. To have and to hold said lot or parcel of ground as above mentioned, with the hereditaments and appurtenances thereto belonging to him the said Cobb, his heirs, &c., and to and for their own purpose, benefit, and behoof forever; and the said Lewis, for himself, his heirs, and executors, and administrators, covenants to warrant and defend with the said Cobb the title to said property, to him the said Cobb, and his heirs, &c., forever, free from the claims of all persons claiming or to claim the same or any part thereof, and declares that at and until the signing and executing this instrument, the said lot and premises are free of all mortgage, lien, or other incumbrance whatsoever. In witness whereof, the said Stacy B. Lewis hereto subscribes his name the day and date above.

STACY B. LEWIS. [L. S.]

Teste,
J. BURROWS GARDINIR.

Stacy B. Lewis this day appeared before me and acknowledged the above and within instrument to be his act and deed for the purposes therein set forth.

Given under my hand, March 20th, 1846.

Teste, OSCAR FARISH,
C. C. G. C.

Filed, March 20th, 1846, 10 A.M.
Recorded, March 21st, 1846, 9 A.M.

OSCAR FARISH,
C. C. G. C.

The State of Texas, County of Galveston.

I, Oscar Farish, clerk of the County Court of Galveston County, hereby certify that the foregoing pages from 1 to 4, inclusive, contain a true copy from the records of my office of the foregoing deeds or instruments of writing, to wit, a deed from the city company to P. G. Merritt; deed from P. G. Merritt to Hosea J. Levis; Hosea J. Levis power of attorney to Moro Phillips; deed from Hosea J. Levis by attorney, Moro Phillips, to Stacy B. Lewis; deed from Stacy B. Lewis to Francis R. Cobb, with the authentication and time of filing and registration of said several deeds or instruments of writing, duly examined and compared.

[L. S.] In witness whereof, I, Oscar Farish, clerk of the County Court of Galveston County, hereto subscribe my name and affix the seal of said County Court, February 20th, A.D. 1854.

OSCAR FARISH,
Clerk.

The United States of America, District of Texas, to wit.

This day Thomas M. League personally appeared before me, John C. Watrous, judge, &c., and made oath in due form, that he has attempted to procure, but cannot procure, the original deeds or instruments of writing, copies from the records of which are mentioned in the foregoing certificate.

THOS. M. LEAGUE.

Subscribed and sworn to, January 18th, 1855.

JOHN C. WATROUS,
U. S. Judge.

Deed from Cobb and Wife to Hasbrook.

The State of Texas, County of Galveston.

This indenture, made this twenty-eighth day of June, in the year of our Lord one thousand eight hundred and forty-eight, between Francis R. Cobb, of the city of Galveston, and Elizabeth Cobb, his wife, party of the first part, and Israel G. Hasbrook, of the same place, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of nine hundred and fifty dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have assigned, sold, conveyed, and transferred, and do hereby sell, assign, convey, and transfer to the said party of the second part, his heirs and assigns, all that certain piece or parcel of land situate in said city of Galveston, and known and distinguished on the map thereof as lot number four (4) in block number four hundred and forty-one (441), together with all the messuages, tenements, rights, and privileges and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the *the* same to the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, for themselves, do hereby covenant and agree to and with the said party of the second part, that the above-described premises, hereby demised, are free from all incumbrance whatsoever, and that the title thereto is good and valid in them, and that they have full power and right to convey the same, and against all persons claiming and to claim the same, by, from, or under them or either of them, to the said party of the second part, in full, peaceable, and quiet enjoyment, his heirs, executors, administrators, and assigns will warrant and forever defend.

In testimony whereof, we have hereunto set our hands and scrawls for seals, the day and year first above mentioned.

FRAN. R. COBB. [L. S.]
ELIZABETH COBB. [L. S.]

Signed, sealed, and delivered
in presence of
E. P. HUNT,
F. A. RIDEMYER.

State of Texas, County of Galveston.

Before me, E. P. Hunt, a notary public of Galveston county, personally appeared Elizabeth Cobb, wife of Francis R. Cobb, parties to a certain deed or writing, bearing date the twenty-eighth day of June, eighteen hundred and forty-eight, on the reverse hereof written, and having been by me examined privily and apart from her said husband, and having the same fully explained to her, she the said Elizabeth Cobb acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and wished not to retract it, to certify which, I hereunto sign my name and affix my seal, this thirtieth day of June, eighteen hundred and forty-eight. Afterwards, to wit, on the same day personally came Francis R. Cobb, to me the said notary personally known, and acknowledged that he has executed the deed on the reverse hereof for the consideration and purposes therein stated.

[L. S.] In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, the day and year last above written.

E. P. HUNT,
Notary Public.

The State of Texas, County of Galveston.

I, Oscar Farish, clerk of Galveston County Court, hereby certify that the within instrument of writing was filed for record July 1st, 1848, at 9 A. M., and recorded same day, at 10 A. M., Book F. page 577.

[L. S.] In witness whereof, I hereto subscribed my name and affix seal of said court, July 1st, A.D. 1848.

OSCAR FARISH,
Clerk.

Deed from Hasbrook and Wife to Curtiss.

State of Texas, County of Galveston.

Know all men by these presents, that we, Israel G. Hasbrook and Mahala Hasbrook, his wife, both of the State and county aforesaid, for and in consideration of the sum of twelve hundred dollars, to us in hand paid by E. Augt. Curtiss, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto him the said Curtiss, heirs and assigns, forever, all our right, title, and interest in and to a certain lot or parcel of land in the city of Galveston, known on the map of said city as lot number four (4) in block number (441) four hundred and forty-one, together with all the hereditaments and appurtenances in anywise appertaining or belonging to the same.

To have and to hold the above-described lot with, all the hereditaments and appurtenances thereunto belonging, unto him the said Curtiss, his heirs, and assigns; and we the said Israel G. Hasbrook and Mahala, his wife, for ourselves, our heirs, administrators, and assigns, do warrant and forever defend the title to said lot and appurtenances unto the said Curtiss E. Augustus, his heirs, administrators, and assigns, against all persons whatsoever lawfully claiming or to claim the same or any part thereof by, through, or under us.

In witness whereof, we have hereunto set our hands and seals this the (8) eighth day of February, eighteen hundred and forty-nine (1849).

I. G. HASBROOK. [L. S.]
MAHALA HASBROOK. [L. S.]

P. G. MERRITT.
C. MCFARTIN.

State of Texas.

Before me, Elisha A. Rhodes, a notary public in and for the county of Galveston, State aforesaid, Israel G. Hasbrook and Mahala Hasbrook, his wife, and acknowledged the within conveyance to E. Augustus Curtiss to be their act and deed, and the said Mahala, wife as aforesaid, being previously examined by me apart from her said husband, and having the same fully explained to her, she declared that she had signed, sealed, and delivered the same of her own free will and accord.

[L. S.] To certify which, I hereunto subscribe my name and affix the seal of my office at Galveston, the tenth day of February, A.D. 1849.

E. A. RHODES,
Notary Public.

The within instrument of writing filed for record, Feb. 26, 1849, at 9 A.M., and recorded same day, 10 A.M., Book I. page 11.

[L. S.] Witness Oscar Farish, clerk of Galveston County Court, Feb. 26, 1849.

OSCAR FARISH,
Clerk.

Power of Attorney—Curtiss to Garlick.

State of Texas, County of Galveston.

Know all men by these presents, that I, E. Augustus Curtiss, of the State of this, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Henry S. Garlick, of the State and county aforesaid, my true and lawful attorney, for me and in my name, place, and stead to ask for, demand, receive, sue for, and collect every sum, debt, claim, and demand of any and every nature or kind whatsoever due, owing, or in any way belonging to me by any person or persons, firm or firms in the State of Texas, and, on receiving the same, to give good and sufficient releases and discharges, and for me to receive any conveyances of real estate and convey the same away by deed or otherwise, with full power and authority to purchase and sell real estate and all other property, to mortgage, deed in trust, let and loan, and generally to do any matter or thing in relation to my property in such manner as to him may seem most for my interest, and also to draw and indorse notes and drafts,—giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof. In witness whereof, I, the said E. Augustus Curtiss, have hereunto set my hand and seal, this second day of May, in the year of our Lord one thousand eight hundred and forty-nine.

E. AUGUSTUS CURTISS. [L. S.]

In presence of
P. G. MERRITT,
L. DANY.

The State of Texas, County of Galveston.

Before me, Oscar Farish, clerk of Galveston County Court, this day appeared P. G. Merritt, to me known, who being sworn, said, that E. Augustus Curtiss signed and executed the power of attorney on the first and second pages of this sheet in his presence; and that he, at the request of said Curtiss, signed his named thereto as a witness. Curtiss acknowledging the same to be his act and deed for the consideration and purposes therein stated.

[L. S.] Given under my hand and seal of said county court, January 19th, 1850.

OSCAR FARISH,
Clerk.

Filed January 19th, 1850, at 12 M.
Recorded January 19th, 1850, at 4 P.M.

O. FARISH,
Clerk.

The State of Texas, County of Galveston.

The within power of attorney from E. A. Curtiss to H. S. Garlick, the certificate of probate thereof, and the time of filing and registering the same are true copies from the records of my office.

In witness whereof, I, Oscar Farish, Clerk of the County Court of Galveston County, hereto subscribe my name and affix the seal of said court this 8th day of January, A.D. 1855.

[L. S.]

OSCAR FARISH,
Clerk.

The United States of America, District of Texas, to wit:

This day Thomas M. League personally appeared before me, judge, &c., and made oath in due form that he has endeavored to procure, but cannot procure, the original power of attorney, of which the foregoing purports to be a copy of the record.

THOS. M. LEAGUE.

Sworn and subscribed the 18th day of January, 1855.

JOHN C. WATROUS,
U. S. Judge.

Deed. E. A. Curtiss to S. Southwick.

The State of Texas, County of Galveston.

Know all men by these presents that I, E. Augustus Curtiss, of the State of Ohio, for and in consideration of the sum of eight hundred dollars to me in hand paid by Stephen Southwick, of the State and county aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto Stephen Southwick, his heirs and assigns, all my right, title, and interest in and to all that lot or parcel of land lying and being situated in the city of Galveston, known and described on the map of said city as lot number four (4), in block number four hundred and forty-one (441), together with all the hereditaments and appurtenances thereunto appertaining and belonging.

To have and to hold the said lot and appurtenances unto him, the said Stephen Southwick, his heirs and assigns, forever. And I, the said E. Augustus Curtiss, for myself, my heirs, administrators, and assigns, do hereby warrant and forever defend the title to the aforesaid lot and appurtenances unto him, the said Stephen Southwick, his heirs, executors, and assigns, against all persons whatsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under me.

In witness whereof, I hereunto set my hand and (scroll) seal, this, the seventeenth day of November, A.D. one thousand eight hundred and fifty.

E. AUGUSTUS CURTISS.
Per HENRY S. GARLICK,
Agent and Attorney.

Witnesses,
P. G. MERRITT,
J. McDAVIDSON.

Deed. S. Southwick to T. M. League.

State of Texas, County of Galveston.

Be it known that I, Stephen Southwick, of the city and county of Galveston, State of Texas, do hereby bargain and sell, give, grant, and convey to Thomas M. League, of the State of Maryland, for and in consideration of the sum of twelve hundred and fifty dollars to me in hand paid, the receipt whereof is hereby acknowledged and an acquittance given, all that certain piece of property or lot of land situated, lying, and being in the city and county of Galveston, State of Texas, and known, designated, and described in the plan of said city as lot number four, in block number four hundred and forty-one, together with all the improvements situated thereon, rents, issues, and profits thereof, due or to become due. To have and to hold the above-described lot or parcel of land, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise incidental thereto, unto the said Thomas M. League, his heirs and assigns, forever, free from the claim or claims of myself, my heirs, executors, administrators, or assigns, forever.

In witness whereof, I hereunto set my hand and seal this 14th day of December, A.D. 1853.

STEPHEN SOUTHWICK. [L. S.]

Witness,
S. Kirkland,
J. B. Brown.

The State of Texas, County of Galveston.

Before me, Oscar Farish, clerk of the County Court of Galveston County, this day appeared Stephen Southwick, to me known, who acknowledged the within instrument of writing to be his act and deed for the consideration and purposes therein stated.

[L. S.] Given under my hand and seal of said County Court January 28th, 1854.

OSCAR FARISH,
Clerk.

The State of Texas, County of Galveston.

The within instrument of writing was filed for record January 28th, 1854, at 9 A.M., and recorded the same day at 10 A.M., book "K." page 406.

In witness whereof, I, Oscar Farish, clerk of the County Court of Galveston County, hereto subscribe my name and affix seal of said court, January 28th, 1854. [L. S.]

OSCAR FARISH,
Clerk.

Bill of Exceptions, continued.

And the plaintiffs, in order to show that the defendants claimed under I. G. Hasbrook, gave in evidence the following deed, to wit: a deed from Pryor Bryan, sheriff, to D. D. Atchison, which was as follows:

Deed from Bryan, sheriff, to Atchison.

The State of Texas, County of Galveston.

Know all men by these presents that I, Pryor Bryan, sheriff in and for the county of Galveston, by virtue of an execution to me directed from the clerk of the aforesaid county, dated 10th August, 1849, and numbered 36, for the sum of ($127 52), debt ($58 65), interest, and ($24 20) costs of suit, wherein Alfred Edwards is plaintiff and I. G. Hasbrook is defendant, did levy in lot number (4) four in block number four hundred and forty-one (441), in the city of Galveston, with all the buildings and improvements situated thereon, which said levy was made on the 10th September, 1849, and on the same day said property was advertised for sale on the first Tuesday in October, 1849, before the court-house door of Galveston county, between the hours of ten o'clock A.M. and 4 P.M., by posting up notices at three of the most public places in the county, one of which being the court-house door, and on the second day of October, A.D. 1849, it being the first Tuesday in said month, I, Pryor Bryan, sheriff in and for said county of Galveston, offered and exposed the aforesaid property for sale at public auction before the court-house door of Galveston county, between the hours of 10 o'clock A.M. and 4 o'clock P.M., to the highest bidder for cash without appraisement, and the same was struck off to Daniel D. Atchison, he being the highest and best bidder for the same, having bid the sum of ten dollars, which was more than any others did or would bid. Now be it known that I, Pryor Bryan, sheriff as aforesaid, do by these presents, in consideration of the premises and the said sum of ten dollars to me in hand paid, the receipt whereof is hereby acknowledged, grant, bargain, sell, and release unto the said Daniel D. Atchison, his heirs or assigns, all the right, title, and interest of the said I. G. Hasbrook in and to the above described property, being lot number (4) in block No. (441), situated in the city of Galveston, together with all the improvements thereon, to have and to hold the same unto the said Daniel D. Atchison, his heirs or assigns, forever, as fully and as completely as I, Pryor Bryan, sheriff as aforesaid, can convey the same by virtue of the proceedings had in the premises under said execution, and by virtue of my office as sheriff aforesaid.

In testimony whereof, I, Pryor Bryan, sheriff in and for the county of Galveston, have hereunto set my hand and seal (a scrawl being used, having no seal of office), in the city of Galveston, this second day of October, 1849.

P. BRYAN, [L. S.]
Sheriff, G. C.

The State of Texas, County of Galveston.

Before me, Oscar Farish, clerk of Galveston County Court, this day appeared P. Bryan, sheriff of Galveston County, to me known, who acknowledged the above and within instrument of writing to be his act and deed, for the consideration and purposes therein stated.

[L. S.] Given under my hand and seal of said County Court, October 6th, 1849.

OSCAR FARISH,
Clerk.

The foregoing instrument of writing, filed for record, November 23d, at 10 A.M., and recorded same day at 2 P.M., Book I., page 135.

[L. S.] In witness whereof I hereto subscribe my name, and affix seal of said County Court, November 23d, 1849.

OSCAR FARISH,
Clerk.

Bill of Exceptions, continued.

And the plaintiff also proved that at the time of the institution of the suit, the defendants were in possession of the lot sued for, and that the defendant Atchison had since continued in possession thereof.

And thereupon the defendants, after adducing some testimony for the purpose of showing that the deed from I. G. Hasbrook and wife to E. Augustus Curtiss, was originally executed, delivered, and acknowledged with blanks for the name of the grantee, and was consequently inoperative as a consequence, and that the signature of E. Augustus Curtiss to the power of attorney to Garlick was a forgery, and the execution thereof not sufficiently proved, gave in evidence a quitclaim deed from the President of the Republic of Texas to M. B. Menard, made under the act of the Republic of Texas, approved December 9th, 1836; also a conveyance from M. B. Menard to the Galveston City Company; also the act of the Republic of Texas incorporating the Galveston City Company, approved February 5th, 1841; also transcript of proceedings and judgment Alfred Edwards against Israel G. Hasbrook, executions and sheriff's return thereon, and sheriff's deed to said Atchison, which deeds and acts and transcripts are as follows, to wit:

Deed President Rep. of Texas to M. B. Menard.

In the name of the Republic of Texas:

To all to whom these presents shall come, know ye, that I, Saml. Houston, President of the Republic of Texas, by the authority in me vested, in consideration of the sum of fifty thousand dollars, and in pursuance of an act of Congress, passed on the ninth day of December, A.D. 1836, and by virtue of the authority thereby in me vested, have granted and confirmed, and by these presents do grant and confirm, unto Michel B. Menard, his heirs and assigns, by deed of quitclaim, all that tract of land, lying, being, and situate on the east end of Galveston island, and bounded as follows, viz.: Beginning at the northeast corner of lot No. ten (10), in section No. one (1), as represented in the plat of survey of the island of Galveston, made by R. C. Trimble, and William Lindsey, under direction of the secretary of the treasury, and running thence due north one hundred and fifty varas to a stake; thence eastwardly with the channel of the harbor in the bay of Galveston, and with the general course of said island, at the distance of at least one hundred and fifty varas from the shore, to a stake one hundred and fifty varas from extreme eastern point of said island; thence south to the Gulf of Mexico; thence with the meanders of the gulf, to the southeast corner of lot no one (1), in said plat of survey; thence northwardly across the island with the eastern boundary of lots Nos. one, two, three, four, five, six, seven, eight, nine, and ten, to the beginning, except the reservation expressed in the fifth section of the act of Congress aforesaid.

To have and to hold the said tract of land with all the appurtenances thereunto belonging, to the said Michael B. Menard, his heirs and assigns, for his or their own proper use and behoof.

In testimony whereof I have caused this patent to be issued under the seal of the Republic, and the commissioner of the general land office to countersign the same, and affix his private seal (there being yet no public seal provided) hereunto. Given under my hand in the city of Houston, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and thirty-eight, and of the independence of Texas the second.

SAM. HOUSTON,
Seal of the Republic of Texas.
JOHN P. BORDEN,
Commissioner of the General Land Office.

Commissioner General Land Office, private seal.

GENERAL LAND OFFICE,
AUSTIN, August 18th, 1859.

I, Francis M. White, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a true copy of the original patent, taken from the records of this office.

[L. S.] In testimony whereof I hereunto set my hand and affix the seal of said office, day and date above written.

FRANCIS M. WHITE.

Conveyance. M. B. Menard. Galveston City Co.

Republic of Texas, County of Galveston.

Know all men by these presents, that I, Michael Brandermoin Menard, of the Republic and county aforesaid, in consideration of value received, to me paid by the president and directors of the Galveston City Company, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm, unto the said president, directors and stockholders of the Galveston City Company, all that certain lot or parcel of land lying, situate and being on the east end of Galveston island, in the Republic and county aforesaid, comprising one league and labor of land, together with all and singular the rights, members, hereditaments and appurtenances to the same belonging, or in any wise incident or appertaining, being one league and labor of land granted to John N. Seguin, by the government of the State of Coahuila and Texas, on the twenty-seventh of April, 1833, by virtue of authority vested in the governor, under the decree of the Congress of said State, No. 128, dated April 7th, 1830, and in article 12 of said decree, title issued by the alcalde on the 30th July, 1834. In virtue of which title, I hold the said league and labor of land, and also in virtue of a patent, issued to me on the 25th day of January, one thousand eight hundred and thirty-eight, by the president and commissioner of the general land office of the Republic aforesaid, in pursuance of an act of Congress, passed on the ninth day of December, one thousand eight hundred and thirty-six, to have and to hold all and singular the premises above mentioned unto the said president, directors and stockholders, and their successors, forever. And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said president, directors and stockholders, and their successors, forever. And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend the said premises, all and singular, unto the said president and stockholders, and their successors, against every person or persons whomsoever, lawfully claiming, or to claim, the same or any part thereof, by, through, or under me. In witness whereof, I have hereunto set my hand and seal, in the city of Galveston, this first day of January, one thousand eight hundred and forty-two.

M. B. MENARD. [L. S.]

Signed, sealed and delivered
in the presence of

This day, M. B. Menard appeared before me and acknowledged the foregoing instrument to be his act and deed for the purposes therein set forth.

Given under my hand this 4th January, 1842.
Teste, OSCAR FARISH,
C. C. G. C.

Filed January 4, 1842, at 9 A.M.
Recorded " " " 10 A.M.

O. FARISH,
C. C. G. C.

The State of Texas, County of Galveston.

I, Oscar Farish, clerk of the County Court of Galveston County, hereby certify, that the foregoing is a true copy from the records of my office, Record Book B., No. 2, page 121, being a deed from M. B. Menard to the president, directors and stockholders of the Galveston City Company, the certificate of acknowledgment thereof and the time of filing and registering the same.

[L. S.] In witness whereof, I, Oscar Farish, clerk of the County Court of Galveston County, hereto subscribe my name and affix seal of said court, this 12th day of May, A.D. 1859.

OSCAR FARISH,
Clerk.

Act to Incorporate the Galveston City Company.

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled: That the stockholders in the Galveston City Company be, and they are hereby incorporated under the same name and style, and under it may transfer their rights by succession or assignment, and shall be persons in law capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever; and also, that they and their successors, by some name and style, shall be in law capable of holding and conveying any estate, real, personal or mixed, and doing and performing all things which are necessary and not contrary to the constitution of this Republic.

Sec. 2. Be it further enacted, that the management of said company shall be conducted by a board of five directors, each of whom shall own at least five shares of the capital stock of said company, and three of said directors shall constitute a quorum, to do and perform all the business necessary to the successful operation of said company. A majority of said directors shall appoint a president, from their own number, and fill such vacancies as may from time to time take place, from death, resignation, or otherwise. The election of directors shall take place in the city of Galveston, on the first Monday of November, of each and every year, and in case of failure so to elect said directors, the corporation shall not be dissolved for that cause, but the president and directors, for the time being, shall continue in office until there shall be an election; provided also, that it shall be the duty of said directors to call a meeting of the stockholders, at an early day, to elect the directory so omitted to be done at the regular period.

Sec. 3. Be it further enacted, that each stockholder shall have one vote for each share that he may own, and may vote in person or by proxy.

Sec. 4. Be it further enacted, that the president and directors shall have authority to adopt all such rules, regulations and by-laws, as they may consider necessary for the proper management of the affairs of said company.

Sec. 5. Be it further enacted, that it shall not be lawful, under this act, for the company to exercise banking privileges in any form whatever.

DAVID S. KAUFMAN,
Speaker of the House of Representatives.
ANSON JONES,
President pro tem. of the Senate.

Approved February 5, 1841.

DAVID G. BURNET.

Transcript. *Edwards* v. *Hasbrook.*

Transcript of a cause lately depending in the District Court, in and for the County of Galveston, State of Texas, between Alfred Edwards, plaintiff, and I. G. Hasbrook, defendant, to be used in evidence in a cause now pending and at issue in the District Court of the United States for the District of the State of Texas, wherein is plaintiff, and defendant.

The State of Texas, County of Galveston.

In the District Court in and for the County of Galveston.

ALFRED EDWARDS, plaintiff,
v.
I. G. HASBROOK, defendant.
No. 201.

Be it remembered, that heretofore, to wit, on the 29th day of September, in the year of our Lord one thousand eight hundred and forty-seven, the said Alfred Edwards, plaintiff in the above entitled cause, by his attorney, John J. Mills, Esq., filed his petition in said court, complaining against the said I. G. Hasbrook, in the words and figures following, to wit:

Petition, filed September 29th, A.D. 1847.

State of Texas, County of Galveston.

Nov. Term, 1847.

To the Hon. James Love, Judge of the First Judicial District of the State of Texas, County aforesaid.

Your petitioner, Alfred Edwards, would most respectfully represent unto your honor, that I. G. Hasbrook, on the twenty-second day of August, in the year eighteen hundred and forty-three, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then promised to pay, forty days after date thereof, to the order of I. G. Hasbrook, the sum of one hundred and twenty-seven dollars and fifty-two cents, at the bank of Salina, for value received, with interest. And the said I. G. Hasbrook, to whose order the payment of the said sum of money in the said note specified was to be made, after the making of the said note, and before the payment of the sum of money therein specified, indorsed the said note, by which said indorsement the said I. G. Hasbrook then ordered the said sum of money, in the said note specified, to be paid to your petitioner. By means whereof, the said I. G. Hasbrook then became liable to pay to the said petitioner the sum of money in said note specified, according to the terms and effect of said note.

Now your petitioner avers that the said I. G. Hasbrook has not paid the said sum of money in the said note specified, or any part thereof, although often requested so to do.

Wherefore, your petitioner prays that said I. G. Hasbrook may be cited to be and appear at the next regular term of your honorable court, then and there to answer this petition, and that petitioner may then and there have judgment against said I. G. Hasbrook, for the said sum of money in the said note specified, with interest and damages and costs of suit, as in duty bound your petitioner will ever pray, etc.

JNO. J. MILLS.

And thereupon, afterwards, on the same day, a citation was issued to the said defendant in the words and of the tenor following, to wit:

Citation issued September 29th, 1847.

The State of Texas, County of Galveston.

District Court, Fall Term, 1847.

To the sheriff of said county, greeting:

You are hereby commanded to summon Israel G. Hasbrook if he be found in your county, to be and appear before the honorable the judge of the first judicial district, at a court to be holden within and for the county of Galveston, on the eighth Monday after the second Monday in September, 1847, to answer the complaint of Alfred Edward, in an action of debt to the amount of one hundred and twenty-seven and $\frac{52}{100}$ ($\$127\frac{52}{100}$) dollars, as set forth in the petition, of which you will serve the said defendant Hasbrook with the accompanying copy. Herein fail not, and have you then and there this writ.

[L. S.] Witness James W. Moore, clerk of said court, this 29th day of September, A.D. 1847, with the seal of said court.

Attest, J. W. MOORE,
Clerk.

And which said citation the sheriff of Galveston county indorsed, with the following return of service, to wit:

Received September 29th, 1847, and executed same day by serving the defendant with a certified copy of plaintiff's petition and a true copy of this writ.

P. BRYAN,
Sheriff Galveston county.

And afterwards, to wit, on the twenty-second day of November, A.D. 1847, the following entry was made in this cause, to wit:

ALFRED EDWARDS
v.
ISRAEL G. HASBROOK.

Judgment by default.

And afterwards, to wit, on the twenty-fifth day of November, A.D. 1847, the defendant, by his attorney, filed his answer herein, in the words and of the tenor following, to wit:

The State of Texas, County of Galveston.

In District Court, Fall Term, 1847.

ALFRED EDWARDS
v.
ISRAEL G. HASBROOK.

And now comes the said defendant Hasbrook, and excepts to plaintiff's petition, and says that the same is insufficient in law, and said defendant here assigns and shows to the court the following reasons for exception to said petition.

First. Said defendant is complained of in said petition as indorser on said supposed note therein described.

Second. For that it does not appear in and by said petition that said note was ever presented for payment at the bank of Salina.

Third. For that it does not appear in and by said petition, that said note has not been fully paid and discharged.

And for further answer, defendant denies that he owes the plaintiff any sum whatever.

And defendant further says, that if he ever owed plaintiff anything, the same has long since been paid.

J. A. SWETT,
For Defendant.

And afterwards, on the eighth day of December, A.D. 1847, the following entry was, by order of the court, made in this cause, to wit:

ALFRED EDWARDS
v.
ISRAEL G. HASBROOK.

Leave to plaintiff to amend.

And thereupon afterwards, on the same day, to wit, on the eighth day of December, the said plaintiff, by his attorneys, filed his amended petition, in the words and of the tenor following, that is to say:

State of Texas, County of Galveston.

ALFRED EDWARDS
v.
I. G. HASBROOK.

To the Hon. James Love, judge of the first judicial district of the State of Texas, sitting in and for the county aforesaid.

Your petitioner, Alfred Edwards, who resides in the city and State of New York, in the above entitled cause, leave of the court being first had and obtained, files this his amended petition in open court.

Your petitioner avers that his residence is as above stated, and that I. G. Hasbrook is a resident of the county of Galveston and State of Texas.

Your petitioner inserts the words "time of" immediately before the word "payment," opposite the first mark (‡) in the margin of his petition.

Your petitioner inserts as follows opposite the second mark * in the margin, "Which said note is herewith filed with the indorsements thereon, and prayed to be made a part of this petition.

ALEXANDER & ATCHISON,
Plaintiff's Attorneys.

$127 52, interest, $1 16, is $128 58.

SALINA, August 22d, 1843.

Forty days after date I promise to pay to the order of I. G. Hasbrook, one hundred and twenty-seven $\frac{52}{100}$ dollars, at the bank of Salina, for value received, with interest.

I. G. HASBROOK.

(Indorsed on the back): Pay to the order of Alfred Edwards.

And afterwards, on the thirteenth day of December, A.D. 1847, the said plaintiff, by his attorney, filed his exceptions to the answers of the said defendant in the words and of the tenor following, to wit:

State of Texas, County of Galveston.

Exceptions.

ALFRED EDWARDS
v.
I. G. HASBROOK.

November, 1847.

And the said Alfred Edwards, by his attorneys, comes and excepts and demurs to the defendant's answers, and says, that they are not sufficient in law. And he assigns the following cause which may might be taken, that they are not responsive to the petition.

ALEXANDER & ATCHISON,
Plaintiff's Attorneys.

And afterwards, on the same day, to wit, the 13th day of December, A.D. 1847, the following order was passed by the court in this cause, to wit:

ALFRED EDWARDS
v.
I. G. HASBROOK.

This day came the parties, by their attorneys; the defendant's demurrer heretofore filed being heard, the same is sustained, and the plaintiff, by his attorneys, refusing to plead further, it is ordered that this suit be dismissed, and that the defendant recover of and from the plaintiff all the costs in this suit expended.

Notice of Appeal by Plaintiff.

And afterwards, on the 17th day of December, A.D. 1847, the plaintiff, by his attorneys, tendered and filed his bill of exceptions in the words and of the tenor following, to wit:

State of Texas, County of Galveston.

November Term, 1847.

ALFRED EDWARDS, plaintiff,
v.
I. G. HASBROOK, defendant.

Bill of Exceptions.

Be it remembered that upon the calling of the above entitled cause upon exception to plaintiff's petition, after argument of counsel of the parties, it was ordered and ruled by the court that the defendant's exception for and as to the first and second of the reasons assigned And that the third reason be overruled, which first and second reasons are as follows, to wit:

First. Said defendant is complained of in said petition as indorser in said supposed note therein described.

Second. For that it does not appear in and by said petition that said note was ever presented for payment at the bank of Selina.

Whereupon upon leave offered by the court, the plaintiff's counsel having declined to amend his petition, the cause was dismissed with judgment against the plaintiff for costs, &c.

All of which is excepted to by plaintiff's counsel, who tenders, and with leave of the court files in open court, this his bill of exceptions, which he prays may be signed, sealed, and enrolled, and made a part of the record in this cause.

JAMES LOVE. [L. S.]
ALEXANDER & ATCHISON,
Plaintiff's Attorneys.

And afterwards, on the twenty-first day of January, A.D. 1848, the said plaintiff, by his attorneys, filed his petition for a writ of error in this cause, which petition is in the words and figures following, to wit:

EDWARDS
v.
HASBROOK.

To James W. Moore, Esquire, clerk of the District of the first judicial district of the State of Texas, holden in and for the county of Galveston.

This petitioner, Alfred Edwards, of the State of New York, who brought suit at the fall term of the aforesaid District Court against I. G. Hasbrook, who resides in the county and State first above specified, referring to the petition and the whole record, and all the papers on file in the above entitled cause as a part of this petition, and showing for cause all the several demurrers and exceptions filed in said suit as grounds for a writ of error, and assigning the judgment of the court in sustaining the demurrer and exceptions to the petition and dismissing the same as error: prays that a writ of error may be issued (after due citation) returnable to the present term of the Supreme Court of the State of Texas, in this cause. And your petitioner will ever pray, &c.

ALFRED EDWARDS,
By ALEXANDER & ATCHISON,
His Attorneys.

And thereupon afterwards on the same day, to wit, the 21st of January, A.D. 1848, a writ of error was issued in said cause, in the words and figures following, to wit:

The State of Texas, County of Galveston.

To the sheriff of said county, greeting:

Whereas, Alfred Edwards, on the 21st day of January, A. D. 1848, filed his petition in the clerk's office of the District Court in and for the County of Galveston, praying that a writ of error be issued upon a judgment rendered in said court at the fall term, 1857, against said Alfred Edwards, in a certain suit, wherein said Edwards is plaintiff and I. G. Hasbrook is defendant.

You are therefore hereby commanded to cite the said I. G. Hasbrook, to be and appear before the Supreme Court now in session at the city of Austin, in and for the State of Texas, to answer this writ and the matters and things set forth in said petition, of which you will serve the said I. G. Hasbrook with the accompanying copy.

Herein fail not, and due return make of this writ in thirty days from the date hereof.

[L. S.] Witness James W. Moore, clerk of said District Court, with the seal thereof, this 21st day of January, A. D. 1848.

Attest, JAMES W. MOORE,
Clerk D. C. G. C.

Upon which said writ of error the sheriff of the county of Galveston made the following return of service, to wit:

Received, January 21st, 1848, and executed same day by serving I. G. Hasbrook with a certified copy of the plaintiff's petition, and a true copy of this writ.

P. BRYAN,
Sheriff G. C.

And afterwards on the 20th day of June, A. D. 1848, the plaintiff herein, by his attorneys, filed the mandate of the Supreme Court in this cause, which said mandate is in the words and of the tenor following, to wit:

The State of Texas.

To the District Court of Galveston County, greeting:

Before our Supreme Court, on the 21st day of April, A. D. one thousand eight hundred and forty-eight, the cause upon a writ of error to revise or reverse your judgment between Alfred Edwards, plaintiff, and I. G. Hasbrook, defendant in error, was determined, and therein our said Supreme Court made its order in these words.

No. 686. This cause coming on to be heard, on the transcript of the record of the court below, and the same being inspected, because it seems to the court that there is error in the judgment of the court below, it is ordered, adjudged, and decreed, that the judgment of the court below be reversed, and the cause remanded for further proceedings, and the defendant in error pay all costs of this cause in this court expended, and this decision be certified below for observance.

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed, and executed.

[L. S.] Witness the Honorable John Hemphill, Chief Justice of our said Supreme Court, with the seal thereof annexed at Austin, this thirteenth day of June, A. D. (1848) eighteen hundred and forty-eight.

THOMAS GREEN,
Clerk Supreme Court, Texas.

And afterwards on the first day of July, A.D. 1848, the defendant filed his answer in this cause in the words and of the tenor following, to wit:

The State of Texas, County of Galveston.

In District Court, Spring Term, 1848.

And now comes Israel G. Hasbrook, defendant in the above entitled cause, and says that until he came to the late republic, now State of Texas, he was a resident and citizen of the State of New York; that on or about the 10th day of October, 1843, he, this defendant made an assignment, yielded and gave up all his property of every kind whatever, in payment and satisfaction of his debts, according to and under the insolvent laws of the State of New York aforesaid, said insolvent laws then being in force in said State of New York, and obtained a discharge from said State of New York, and under the insolvent laws thereof; that he was discharged from all his debts and every pecuniary liability incurred previous to making the assignment, and procuring the discharge aforesaid. And defendant says, that subsequent to the accruing of the liability set forth in plaintiff's petition, there was an insolvent and assignment law in force in the State of New York, from whence this defendant emigrated to Texas. That this defendant made an assignment thereafter of all his property, in payment and satisfaction of all his debts of every kind under said law, on or about the 10th day of said October, 1843, previous to defendant's emigrating to Texas, and while defendant resided and was a citizen of said New York, and then and there defendant was legally and fully discharged from all his debts and every pecuniary liability previous thereto. Wherefore defendant says that plaintiff is not entitled to have and maintain this suit, and have judgment herein against the defendant.

J. A. SWETT,
Pro Defendant.

And defendant here moves the court for the time allowed by law, for procuring his said certificate of discharge as above referred to.

J. A. SWETT,
For Defendant.

And defendant further says, that said pretended claim of plaintiff's, as set forth in plaintiff's petition, was barred by the Statute of Limitations, before the commencement of this suit.

J. A. SWETT.

And afterwards, to wit, on the same day in the same year, that is to say, the first day of July in the year A. D. 1848, the following order was passed in this cause, to wit:

ALFRED EDWARDS
v.
ISRAEL G. HASBROOK.

The defendant filed an amendment, to which the plaintiff by his counsel excepts, exceptions to be filed, and this cause continued.

And afterwards, to wit, on the twelfth day of December, A. D. 1848, the plaintiff by his attorneys, filed their motion in the words and figures following, to wit:

ALFRED EDWARDS, plaintiff,
v. } No. 201.
I. G. HASBROOK, defendant.

William Alexander, one of attorneys for the plaintiff, in the above entitled cause, moves this honorable court to take off the files and strike from the record therein, the answer of the defendant, indorsed "Filed July 1st, 1848, J. W. Moore, clerk," and to give judgment for this plaintiff, and he assigns the following cause in support of his said motion, to wit:

(1.) Because the said defendant had already an answer on file, filed November 25th, 1847.

(2.) Because defendant's last answer is inconsistent with the first.

(3.) Because the defendant is estopped of record by his answer first filed, from alleging new and distinct matters of defence, which did not occur since the putting in of the first answer.

(4.) Because the last filed answer does not set forth the facts on which the defendant's supposed defence therein is based, but only the legal conclusions deemed requisite.

(5.) The allegations of said last filed answer are inconsistent with each other.

(6.) The last filed answer is on its face insufficient in law.

(7.) The last filed answer admits away or waives the matters of defence set up in the first.

(8.) The cause could not be continued longer under the last answer properly on file in court, than one year from November 25th, 1847.

(9.) The defendant's motion incorporated in his answer is *functus officio* and irregular, and is not properly before the court.

(10.) The Supreme Court in remanding the cause, did not give leave for either party to amend their pleadings or to file pleadings *de novo*, and the answer first filed is demurred to.

ALEXANDER,
Plaintiff's Attorney.

And afterwards, at the Fall term of said court, to wit, on the twenty-third day of December, A. D. 1848, the court passed an order in this cause, of the words and in the tenor following, to wit:

ALFRED EDWARDS
v. } 201.
ISRAEL G. HASBROOK.

The plaintiff's motion to strike out defendant's last answer, and for judgment, having been argued and submitted to the court, upon consideration thereof, it is ordered that the said motion be, and the same is hereby overruled.

And on motion of the clerk of the court, it is ordered that plaintiff give security for the costs that shall accrue in the prosecution of this cause, within the time prescribed by law.

And afterwards, on the twenty-ninth day of December, 1848, the following entry was made in this cause, to wit:

ALFRED EDWARDS
v. }
ISRAEL G. HASBROOK.

Continued by operation of law, to enable the defendant to obtain the testimony to sustain his plea of discharge under the insolvent laws of the State of New York.

And afterwards at the Spring term, 1849, to wit, on the 13th day of June, A. D. 1849, the following entry was made in this cause, by order of court, to wit:

ALFRED EDWARDS
v.
ISRAEL G. HASBROOK. } 201.

Continued by operation of law to enable the defendant to obtain testimony to sustain his plea of bankruptcy.

And afterwards, to wit, on the third day of July, A. D. 1849, the following judgment was rendered in this cause, to wit:

ALFRED EDWARDS
v.
I. G. HASBROOK. }

This day, came the plaintiff by his attorney. The defendant failing to appear in person or by counsel, it is ordered that the continuance entered herein on a former day of this term, be, and the same is hereby set aside. Thereupon came a jury, to wit, Jonathan Brock, Peter Moser, William Evans, Stephen Southwick, Edmund Logue, William A. Gould, Francis Krœur, Edward F. Williams, Louis Juneman, John G. Brock, A. Bro, and M. K. McDermott, good and lawful men, who being duly elected, tried, and sworn, upon their oaths do say: "We the jury find for the plaintiff the sum of one hundred and twenty-seven dollars and fifty-two cents ($127.52) debt, and fifty-eight dollars and sixty-five cents ($58.65) interest, Wm. Evans, foreman." Therefore it is considered and adjudged by the court, that the plaintiff recover of, and from the defendant the aforesaid sums of one hundred and twenty-seven dollars and fifty-two cents ($127.52) debt, and fifty-eight dollars and sixty-five cents ($58.65) interest, together with all the costs about this suit expended.

And afterwards, on the tenth day of August, A. D. 1849, an execution was issued out of said court upon said judgment, in the words and figures following, to wit:

The State of Texas, Galveston County.

To the Sheriff of Galveston County, greeting:

Whereas Alfred Edwards, on the third day of July, in the year of our Lord eighteen hundred and forty-nine, at our District Court, hath recovered against I. G. Hasbrook the sum of one hundred and twenty-seven dollars and fifty-two cents ($127.52) debt, fifty-eight dollars and sixty-five cents (58.65) interest, and twenty-four dollars and twenty cents ($24.20) for costs of suit, and which to the said Alfred Edwards are now adjudged.

These are therefore to command you that of the goods and chattels, lands and tenements of the said I. G. Hasbrook, you cause to be made the full amount of this execution, after deducting therefrom the legal fees and commissions for collecting the aforesaid amount, and that you have this writ at the clerk's office of said court, on the return day thereof, certifying how you have executed the same.

[SEAL.] Given under my hand, and the seal of said court, this tenth day of August, A. D. 1849.

Attest, J. W. MOORE,
Clerk.

Compute interest on the debt from July 3d, 1849, at eight per centum per annum until paid.

Attest, J. W. MOORE,
Clerk.

Bill of costs. Clerk's fees; copy of petition and writs, .	$1 75
Docketing cause, 15; default, 50; file papers, 1.00; motion, 25, ...	1 90
Ent'g appearance, 10; 4 orders, 1.00; 3 continuances, 45, ...	1 55
Swearing and impanneling jury, 25; receiving verdict, 25,	50
Entering judgments, 1.00; execution and return, 1.00, .	2 00
Taxing costs twice, 50; county tax, 3.00, . . .	3 50
Recording proceedings, 5.00; copy and certificate, 5.50,	10 50
	$21 70
Sheriff's fees for serving two writs, 2.00; jury fee, 50, .	2 50
	$24 20

Attest, J. W. MOORE,
Clerk.

Seventeen dollars and fifty-five cents ($17.55) costs paid to me by D. D. Atchison, atty. for plff., to be returned to him when collected from def't.

J. W. MOORE,
Clerk.

Upon which said execution, P. Bryan, sheriff of the said county of Galveston, made the following return, to wit:

Received the same day issued, and executed Sept. 10th, 1849, by levying upon lot No. (4) four, in block No. (441) four hundred and forty-one, situated in the city of Galveston, with the buildings and other improvements situated thereon, which property was, on said 10th day of September, advertised for sale on the first Tuesday in October next, before the court-house door of Galveston county, between the hours of 10 o'clock A. M. and 4 P. M., for cash, without appraisement, in three of the most public places in the county, one of which being the court-house door. The defendant in said cause has been for several months absent from my county, and my efforts to find an agent or attorney in fact upon whom to call, for property upon which to levy, having proved unsuccessful, and knowing of no property in my county belonging to the defendant, I called upon the attorney of record for the plaintiff, who pointed out the aforesaid property. And on the first Tuesday in October, 1849, I offered and exposed the right, title, and interest of said Hasbrook, in and to the aforesaid lot and improvements, for sale at public auction, before the court-house door of Galveston county, between the hours of 10 o'clock A. M. and 4 o'clock P. M., and the same was struck off, and by me adjudged to Daniel D. Atchison for the sum of ten dollars, which was more than any other person did or would bid. I was notified on the day of sale by H. S. Garlick, that the aforesaid lot and improvements was the property of E. A. Curtis, who forbid the sale as agent of said Curtis.

P. BRYAN,
Sheriff G. C.

Levy, 1.00; advertisement, 1.00; return, 50; com. 30;
deed, 2.00, ... $4 80
Received balance of my fees, ... $4 15
J. W. MOORE.

And afterwards, on the twenty-ninth day of December, A. D. 1849, an alias execution was issued upon said judgment in the words and figures following, to wit:

The State of Texas, to the Sheriff of Comal County, greeting:

Whereas Alfred Edwards, on the third day of July in the year of our Lord one thousand eight hundred and forty-nine, at our District Court in and for the county of Galveston, hath recovered against I. G. Hasbrook, the sum of one hundred and twenty-seven dollars and fifty-two cents ($127.52) debt, fifty-eight dollars and sixty-five cents ($58.65) interest, and thirty dollars ($30.00) for costs, and which to the said Alfred Edwards are now adjudged.

These are therefore to command you, as the sheriff of Galveston county has been heretofore commanded, that of the goods, chattels, and estates of the said I. G. Hasbrook, you cause to be made the full amount of this execution after deducting therefrom the legal fees and commissions for collecting the aforesaid amount. And that you have this writ at the clerk's office of this court on the return day thereof, certifying how you have executed the same.

[SEAL.] Given under my hand and seal of said court, this twenty-ninth day of December, A. D. 1849.

Attest, J. W. MOORE,
Clerk.

Compute interest from July 3d, 1849, at eight per centum per annum, until paid.

Attest, JAMES W. MOORE,
Clerk.

Bill of costs. Clerk's fees; copy of petition and writs,	$1 75
Docketing cause, 15; default, 50; filing papers, 1.00,	1 65
Entering appearance, 10; motion and order, 1.25; 3 continuances, 45,	1 80
Swearing and impanelling jury, 25; recording verdict, 25,	50
Entering judgment, (2) 1.00; executions and returns, 2.00,	2 00
Taxing costs twice, 50; county tax, 3.00,	3 50
Recording proceedings, 5.00; copy and certificate, 5.50,	10 50
	$22 70
Sheriff's fees. For serving 2 writs, 2.00; jury fee, 50,	2 50
Execution, levy, 1.00; returning, 50; advertising, 1.00,	2 50
Deed, 2.00; commissions, 30,	2 30
Cr. by $10 costs made by former execution,	30 00

Attest, J. W. MOORE,
Clerk.

Seventeen dollars and fifty-five cents (17.55) costs paid to me by D. D. Atchison, Esq., atty. for plff., to be returned to him when collected from defendant.

J. W. MOORE,
Clerk.

Upon which execution are the following indorsements, to wit:

The sheriff of Comal county is hereby instructed to proceed and make the money on the within execution without delay.

ALEXANDER & ATCHISON.

February 26, 1860.

(Indorsed): Came to hand, February 2, 1850.

A. MENDKELS,
Sheriff C. C.

DOOLEY, and
ALEXANDER & ATCHISON,
Attorneys for Plaintiffs.

The State of Texas, County of Galveston.

I, John S. Jones, clerk of the District Court in and for the county of Galveston, in the State of Texas, do hereby certify that this and the foregoing nineteen pages contain a true copy of the record, and all the proceedings had in the case of Alfred Edwards against Israel G. Hasbrook, No. 201 on the docket of the said court as the same appears on file and of record in my office.

[L. S.] In testimony whereof, I hereto set my hand and affix the seal of said District Court in and for the county of Galveston, this the twenty-sixth day of January, A. D. 1859.

JOHN S. JONES,
Clerk District Court, Galveston County, State of Texas.

And the deed referred to from Pryor Bryan, sheriff, to D. D. Atchison, already appears in this transcript, on pages 67, 68, 69.

Bill of Exceptions, continued.

And the defendant then gave in evidence the testimony of witnesses conducing to prove that the defendant, Atchison, had held peaceable and continuous adverse possession of the lot in controversy, claiming the same under the said sheriff's deed since October, 1850, and paid taxes thereon.

And the plaintiff, as part of his rebutting proof, gave in evidence facts conducing to show that the deed from I. G. Hasbrook and wife to E. Augustus Curtiss, was regularly executed and delivered so as to be operative as a conveyance, and that the signature of said Curtiss to said power of attorney was not a forgery.

And upon this evidence the court, after instructing the jury as to the facts necessary to be proved to sustain the deed from Hasbrook and wife to E. A. Curtiss, as valid and operative conveyance, and also as to the law arising upon the question as to the execution of the power of attorney to Garlick by Curtiss, proceeded to instruct the jury as to the defence of limitation set up by defendant.

And upon this point, after explaining the law as to the fact and manner of possession which must have been held by defendant, the court further instructed the jury, that to sustain this defence under the plea of defendant, he must have possession under a regular consecutive chain of transfer from the sovereignty of the soil down to the defendant, and if there was any want of connection in any part of said chain of transfer, the defence could not be sustained. That in this case the chain of transfer down to Hasbrook was regular and consecutive, and both parties claimed under him; that there was no want of such connection between the Galveston City Company and P. G. Merritt, but that the deed purporting to be from the directors of the Galveston City Company to P. G. Merritt, of September 10th, 1841, read in evidence by plaintiff, was a sufficient connection of title in this case, and that between Hasbrook and the defendant Atchison there was no want of connection on account of the conveyance of Hasbrook and wife to Curtiss. That the judgment and execution against Hasbrook, and sheriff's deed to Atchison, made a title regular and sufficient on its face, and the jury could not look beyond the face of defendant's title to take into view the previous conveyance from Hasbrook and wife. That the jury must confine their examination to the defendant's chain of transfer, and those being consecutive and regular on their face, were sufficient to sustain the adverse possession. That the sheriff, acting under a judgment and execution against Hasbrook, must be presumed to have the authority to make the levy and sale and deed proved in this case, notwithstanding the lot, before the rendition of the judgment, might have been conveyed away by Hasbrook and wife to plaintiff's grantor, because the jury on the question of limitation could not look at the deed from Hasbrook and wife to Curtiss, and that unless there was some defect or want of authority on the face of the sheriff's deed, the jury could not look beyond it.

At this point in the charge, the counsel for plaintiff desired to know whether the jury were to determine the effect of the sheriff's deed to Atchison.

The court replied that the jury were so to determine under the construction placed thereon, and the law given them on the subject by the court, and repeated his instructions as to said deed.

Thereupon the counsel for the plaintiff requested the court to instruct the jury as follows:

First. That in order to sustain the plea of limitation, the defendant must show a connected chain of transfer of title, by written deeds or by descent, and if any break or interruption of continuity occurs in this chain of transfer, the defence of limitation is not made out; that in the present case there is no legal transfer or conveyance from the Galveston City Company to Phineas G. Merritt, sufficient to sustain limitation.

Second. That if the jury, under the instructions of the court, find a conveyance from Hasbrook and wife to Curtis to be valid, then the sheriff had no authority to make the levy, under the execution against Hasbrook, on the lot in question, or to make the deed to Atchison, and there is no such transfer of title from Hasbrook to Atchison, as will sustain the plea of limitation.

But the court declined to give said instructions as asked; to all which rulings, instructions given, and refusals to give instructions as requested, the said plaintiff, by his counsel then and before the jury retired, excepted: and now tenders this *this* his bill of exceptions, which he prays may be allowed, sealed, and made part of the record of this cause, and the same is now done accordingly.

JOHN C. WATROUS. [L. S.]

And on the same day and year, to wit, the tenth day of February, A. D. 1860, a motion was filed herein for a new trial, which is of the tenor following, to wit:

Motion for a New Trial.

The United States of America, Eastern District of Texas, to wit:
District Court, January Term, 1859.

THOMAS M. LEAGUE
v.
D. D. ATCHISON.

Trespass to try title, &c.

And now comes the plaintiff, by his attorneys, and moves the court for a new trial herein, because:

1st. The verdict is contrary to law and evidence.

2d. The court improperly charged the law.

3d. The court improperly excluded evidence offered by the plaintiff, and admitted improperly evidence offered by defendant.

4th. And there are other grounds, &c.

February 10th, 1859.

HUGHES & ALLEN & HALE,
For Plaintiff.

And afterwards, to wit, on the twenty-fourth day of February, of the same year, the court here made an order in this cause, in words and tenor in substance as follows:

Order of Court.

THOMAS M. LEAGUE
v. No. 477.
D. D. ATCHISON et al.

On this day came on to be heard the motion of plaintiff for a new trial, after argument of counsel heard, because it seems to the court that the law is for the defendant. It is ordered that the motion be overruled, and defendant recover of plaintiff the costs incident to this motion.

And afterwards, to wit, on the twenty-fourth day of March, of the same year, a bond for a writ of error was filed herein, which is in words and tenor in substance as follows:

Bond for Writ of Error.

Know all men by these presents that we, Thomas M. League are held and firmly bound anto Daniel D. Atchison, Eliza A. White, and Abram L. White, in the just and full sum of three hundred dollars, to be paid to the said Daniel D. Atchison, Eliza A. White, and Abram L. White, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and sixty.

Whereas, lately at a term of the District Court of the United States for the Eastern District of Texas, in a suit depending in said court between the said Thomas M. League, as plaintiff, against the said Daniel D. Atchison, Eliza A. White, and Abram L. White, as defendants, was rendered against the said plaintiff; and the said Thomas M. League having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Daniel D. Atchison, Eliza A. White, and Abram L. White, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next.

Now the condition of the above obligation is such that if the said Thomas M. League shall prosecute his writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

THOS. M. LEAGUE. [L. S.]
T. J. LEAGUE. [L. S.]
C. G. WELLS. [L. S.]

Signed, sealed, and delivered
in presence of
ALLEN LEWIS,
JAS. J. THOMPSON.

Approved by JOHN C. WATROUS,
Judge D. C., E. D. T.

And on the same day and year a writ of error issued from our said court, which is in words and figures in substance as follows, to wit:

Writ of Error.

United States of America, *ss.*

The President of the United States of America, to the Honorable [L. S.] the Judge of the District Court of the United States for the Eastern District of Texas, greeting.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Thomas M. League, as plaintiff, and Daniel D. Atchison, Eliza A. White, and Abram L. White, as defendants, manifest error hath happened to the great damage of the said Thomas M. League, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixty.

In testimony whereof, I have hereunto set my hand and affix the seal of the District Court of the United States for the Eastern District of Texas, at Galveston, on the day and year above written.

JAMES LOVE,
Clerk.

Allowed by JOHN C. WATROUS,
Judge D. C., E. D. T.

And on the same day and year a citation in error issued herein, in words and figures in substance as follows, to wit:

Citation in Error.

The United States of America.

To Daniel D. Atchison, Eliza A. White, and Abram L. White, defendants in error, or to William P. Ballinger, their attorney of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, wherein Thomas M. League is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Watrous, Judge of said District Court, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixty.

JOHN C. WATROUS,
Judge D. C., E. D. T.

On this third day of April, in the year of our Lord one thousand eight hundred and sixty personally appeared Lewis W. Stoy, Dept. U. S. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to William P. Ballinger, Daniel D. Atchison, and Lester A. Thompson.

JAMES LOVE,
U. S. Commissioner and Clerk.

The United States of America, Eastern District of Texas.

I, James Love, Clerk of the District Court of the United States of America for the Eastern District of Texas, holding sessions at the city of Galveston, certify that the foregoing one hundred and four pages contain a true and perfect transcript of the record and proceedings had in the cause in said court, numbered 477 on the law docket thereof, and entitled Thomas M. League *v.* Daniel D. Atchison et al.

In testimony whereof, I hereunto set my hand and affix the seal of [SEAL.] said court, at the city of Galveston, this second day of November, A.D. one thousand eight hundred and sixty.

JAMES LOVE,
Clerk.

No. 42.

In the Supreme Court of the United States.

HEIRS AND REPRESENTATIVES
OF
THOMAS M. LEAGUE, Deceased,
VS.
D. D. ATCHISON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT GALVESTON.

This was a suit of Trespass to try Title to a lot in the city of Galveston, Texas. Plaintiff proved as his title a chain of conveyances down to himself, commencing with a deed of James Love, P. J. Menard and Sam'l M. Williams, the Board of Directors of the Galveston City Company, to P. G. Merritt, made Sept. 10, 1841. After deraigning title to himself, he further proved the title under which defendant claimed, "in order to show that defendant also claimed under J. G. Hasbrook," a common source of title to both parties. Defendant pleaded "not guilty," under which evidence was adduced tending to show the deed from Hasbrook and wife to E. Augustus Curtiss was originally executed, delivered and acknowledged, with blanks for the name of the grantee, and was consequently inoperative as a conveyance, and that he signature of E. Augustus Curtiss to the power of attorney to Garlick was a forgery, there being no such person in esse as E. Augustus Curtiss; but the opinion of the Court being with the defendants on the point of limitations, the case is brought up solely on that issue, under which defendant further proved a patent from the Republic of Texas to M. B. Menard, to the Galveston City Company; and the Act incorporating the said Company, authorizing three Directors to "constitute a quorum, and do and perform all the business necessary to the successful operation of said Company," p48. Plaintiff's deed from Hasbrook and wife to E. Augustus Curtiss bore date February 8, 1849. Defendant claimed under a judgment against said Hasbrook, July 3, 1849, execution thereon; Sheriff's sale and conveyance to himself, October 2, 1849.

Defendant proved his adverse possession of the property, paying taxes, &c., for more than three years before suit brought. The instruction of the Court on the plea of limitation was as follows:

"That to sustain this defence under the plea of defendant, he must have possession under a regular consecutive chain of transfer from the sovereignty of the soil down to the defendant, and if there was any want of connection in any part of said chain of transfer, the defence could not be sustained. That in this case the chain of transfer down to Hasbrook was regular and consecutive, and both parties claimed under him; that there was no want of such connection between the Galveston City Company and P. G. Merritt, but that the deed purporting to be from the directors of the Galveston City Company to P. G. Merritt, of Sept. 10, 1841, read in evidence by plaintiff, was a sufficient connection of the title, in this case; and that between Hasbrook and the defendant, Atchison, there was no want of connection on account of the conveyance of Hasbrook and wife to Curtiss That the judgment and execution against Hasbrook, and Sheriff's deed to Atchison, made a title regular and sufficient on its face, and the jury could not look beyond the face of defendant's title to take into view the previous conveyance from Hasbrook and wife. That the jury must confine their examination to the defendant's chain of transfer, and those being consecutive and regular on their face were sufficient to sustain the adverse possession. That the Sheriff acting under a judgment and execution against Hasbrook must be presumed to have the authority to make the levy and sale proved in this case, notwithstanding the lot before the rendition of the judgment might have been conveyed away by Hasbrook and wife to plaintiff's grantor, because the jury on the question of limitation could not look at the deed from Hasbrook and wife to Curtiss, and that unless there was some defect or want of authority on the face of the Sheriff's deed the jury could not look beyond it."

The Court refused instructions asked by plaintiff. 1st. That in the present case there is no legal transfer or conveyance from the Galveston City Company to Phineas G. Merritt sufficient to sustain limitation. 2d. That if the jury find the conveyance from Hasbrook and wife to be valid, then the Sheriff had no authority to make the levy under the execution against Hasbrook on the lot in question, or to make the deed to Atchison, and there is no such transfer of title from Hasbrook to Atchison as will sustain the plea of limitation.

The 15th Section of the Act of Limitations of Texas, is in the following words:

"Every suit to be instituted to recover real estate, as against him, her or them in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. * * By the term title, as used in this section is meant a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her or them in possession, without being regular—as if one or more of the muniments be not registered or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant, or land script, with a chain of transfer down to him, her or them in possession; and provided, this section shall not bar the right of the government"

The opinion of the Judge is a clear and precise construction of this Statute. The character of the Limitation laws of Texas, is apparent. The periods for suit are short, from motives of policy addressing themselves strongly to the law-making power. (Horton vs. Crawford, 10 T. 382.) They are graduated by the nature of the right or claim under which defendants hold possession. If under a consecutive chain of transfer coming down from the government, or the location of any land warrant or script, three years possession bars suit, 15th section; under a deed from any source whatever, whether based on title or claim of title duly recorded, and taxes paid, five years possession. Sec. 16, (13 T. 131, 2, 23 T. 36); and under an unrecorded deed, void will, or any claim defining its extent, ten years possession; and the naked trespasser in the same time for 640 acres. Sec. 17, (10 T. 382, 13 T. 94, 23 T. 46).

What is meant by "regular chain of transfer from or under the the sovereignty of the soil," in this section? Of course, it does not mean the paramount superior title, but is for the protection of the inferior title. Davila vs.

Mumford, 24 How. 223. In Skyle's heirs vs. King's heirs, 2 A. K. M. 387, the Court say:

"The true construction of the words of the Statute, "'a connected title in law or equity, deducible of record "from the Commonwealth,' does and must mean such title "when tested by its own face and not tried by the title "of others. If the defendant's title should be 'a connected "title in law or equity,' supposing no other to exist on the "ground, then, if he proves seven years possession. holding "under it, the statute shall aid him, although the plaintiff "may be able to show, by the production of his own title "or that of others, that the title did not in law or fact, pass "to the defendant."

In Smith vs. Power, 23 T. 33, the Supreme Court of Texas, construing the 15th Section, say:

"It need not necessarily carry with it the paramount "title, but it must be title as against the government, valid "in itself, when tested by itself, and not tried by the title "of others. It must have intrinsic validity as between the "parties to it; though it may be relatively void as respects "the rights of third persons. If it be absolutely void—a "nullity, it cannot be said to be a grant, or the basis of a "transfer of the title from the government."

The principle seems perfectly clear. The Government issues a patent to A.; it issues a subsequent patent to B., or B. makes a location of a land warrant or scrip on the same land; B. holds possession for three years, and his right is good under this section, although he had notice of the previous title, Daviea & Mumford, 24 How.; or although he may have located on the pretence that the first grantee had abandoned the country which proves false; Whitehead's heirs vs. Foly, Austin, 1866. The terms "intrinsic fairness and equity" in defining "color of title," relate to the means of proving the right of property in the land, so as to make the title equitably equal to a regular chain; Pearson vs. Burdett, Austin, T., Oct. 1861; Paschal's Digest, note 1031,—in which case an Administrator sold land and made a deed; the deed was held to be fraudulent, but three years possession under it gave the defendant a good title. A tax assessor's deed, where the sale was in strict conformity with law, makes a good link in the consecutive chain of title, Kelly vs. Medlin, Austin, T., 1861, Paschal's Dig. note 1031. So does an administrator's deed whenever proper orders and decrees of the Court are shown on which it was based, Sapp vs. Newsom, Galveston, T., 1864, Paschal's D. note 1031. If the chain of title, trie by itself, is consecutive and regular it will sustain possession. Its nullity or inadequacy must be for some cause inherent in the title itself and not from an extrinsic title. Thus in Marsh vs. Weir, 21 T. 110, the competent Mexican authority adjudged a title null and revoked and cancelled it, and it was held that it would not sustain limitation. In Smith vs. Power, 23 T. 34, the grant was within the coast leagues, made without the approbation of the Supreme Executive of Mexico, and therefore not a grant from the Government. In Wilson vs. Palmer, 18 T. 592, the judgment being void, Sheriff's deed on sale under it was not within the statute. So in Wright vs. Daily, Tyler, 1863, Paschal's D. note 1031, where the defendant's title had been sold under execution and he subsequently continued in possession, this possession did not attach to his anterior title—nor does the possession of heirs by mere operation of law, where the ancestor has conveyed. Harris vs. Hardeman, Austin, T., 1863, Paschal's D., note 1031. In all these cases the defect in the chain of title is inherent and essential. But in the case before the Court there is every element of a consecutive chain of title from the Sovereignty of the soil. Hasbrook, in anticipation of the judgment of Edwards, placed on record a deed to E. Augustus Curtiss, and a power of attorney appeared on record from E. Augustus Curtiss to H. S. Garlick. Curtiss was and is believed to be a mere fiction, a myth, a nonentity; and the deed to him to convey nothing; and the execution was levied on the property as Hasbrook's property. The instruction asked by the plaintiff was, if the deed to Curtiss was valid, then the deed to Atchison was not such a transfer as will support limitation. In other words, if the deed to Curtiss was invalid, and Atchison's title in itself the best, he was also protected by limitation! It seems not to admit of any reasonable question that the 15th Sec. of the Act of Limitations does not require either the grant or evidence of title from government, or any subsequent link in the consecutive chain of transfer to the party in possession, to be paramount, superior and valid as against any opposing grant, or link in such transfer.

The objection was made that the defendant should have proved *aliunde* the deed from the Galveston City Company to Merritt, the appointment of the parties making said deed as Directors. This might have been requisite had not the deed been already proved by the plaintiff, without objection by defendant, and admitted by the Court as the deed of said Directors. It did not lie in the mouth of plaintiff to deny or question the fact that they were Directors.

Green Adams,
Robert Leech,
Attorneys for Defendant
in Error.

In the Supreme Court of the United States.

No.——.

Heirs of League, Plaintiffs in Error,

vs.

D. D. Atchison, Defendant in Error.

Error from the District Court of the United States for the Eastern District of Texas.

The publication of two volumes of Texas Reports since the preparation of our former brief affords additional illustration of the 15th section of the Act of Limitations of that State—such as will leave no doubt of the correctness of its construction by the Court below.

In Pearson v. Burditt (26 Tex., 157,) the administrator of Silsbee sued to recover land purchased at a sale by a former administrator, (the law in Texas enabling one administrator to set aside the wrongful acts of his predecessor.) The purchaser pleaded the limitation of three years; but it it was proved that the sale and deed were a fraudulent combination between him and the former administrator. The Court say of this plea:

" Whatever may be said about the sufficiency of the proof upon the issue of fraud, the defendant showed that he had been in possession of the land for three years before the institution of the suit, holding by a regular chain of title from and under the sovereignty of the soil. And if that is a good defence in this case, he is entitled to the verdict which he obtained, though that might be contrary to the view of the law entertained and announced in the charge of the Court. We think it is a good defence, notwithstanding the jury might have believed that the fraud in Burditt's deed was sufficiently proved. * * * The leading object and effect of the statute of limitations are to make three years adverse possession of land mature the inferior title in the hands of the possessor into the superior title. (Peck R., 20; 24 Wend. R., 586.) We do not decide this case upon any other principle than those which would govern us were Burditt's only a color of title instead of a title. The terms "intrinsic fairness and honesty" embraced in the definition of color of title in our Statute, relate to the means of proving the right of property in the land, so as to make the title equitably equal to a regular chain."

Wallace v. Wilcox (27 Tex., 60,) is "on all-fours" with the case before the Court. Jordan, the patentee of a tract of land, sold and gave bond for title to Strode. Jordan made a subsequent deed to Duren, under whom there was a chain of conveyance to the defendants who held the land by a tenant for three years, and pleaded limitation to a suit to enforce the right of Strode. The Court say:

"We think the Court below did not err in treating the instrument executed by Jordan in favor of Jeremiah Strode, on the 4th of Febrnary, 1835, as a bond for title, and not an absolute conveyance. * * * But even if the Court had erred in the construction of the instrument referred to, this case would necessarily be determined in favor of the appellees upon the question of limitation. The record shows that the real defendants below, Wm. Scott and Edmund Scott, had been in possession of the land in controversy by their tenant, Wm. Wilcox, for more than three years next before the institution of this suit, claiming the same under title from the Government, and having paid the purchase money."

"By the term title, as used in this section," says the Act, "is meant a regular chain of transfer from or under the sovereignty of the soil." This completes the definition of "*title.*" All that follows relates to "*color of title.*"

"A regular chain of transfer" means a regular chain of *deeds, muniments, paper evidences of title*, and has no relation to their effect and operation actually to convey the property; on the contrary, the very hypothesis on which the statute stands is that they do *not* convey the true right—the property—but that the title to that is adversely held.

There have been various efforts to qualify possession by the claim under which it is held—as the *good faith* of the civil law, and of the earlier Texas statute; that which is *apparently good*, as in Tennessee; that which the party *believed to be good*, as at one time held in North Carolina, etc. But the statute of Texas—more analogous to the seven years limitation law of Kentucky—sets up no moral standard, makes no ethical enquiry, but looks solely to the naked fact of a regular succession of *deeds* from the Government. This being shown, and possession held under it three years, the plaintiff is defeated.

If there is a valid and perfect grant to land, but a party gets a junior patent to the same identical land, and holds under it three years, you can not impeach his defence, whatever his knowledge or his motives, and however unjust or unconscientious his act in procuring the junior patent. And so the title to land, being in any holder who conveys it away by deed, but then makes a subsequent deed to another purchaser, or an execution creditor levies on the land and sells it as still his; in either case, the latter purchaser, holding possession three years by deed, thus connecting himself by a chain of deeds with the sovereignty of the soil, no more than in the case of the junior patent by the State, can you impeach the effect of this possession by the superior title of the first purchaser; or by any knowledge or motives the second purchaser may have had, or any circumstances under which he acquired the second deed.

I am under no necessity to justify this policy, but of its far greater simplicity and practical wisdom than any moral standard, I have not the slightest doubt. How impracticable would the latter be. Take the case before the Court: the bill of exceptions shows that the defendant, Atchison, produced evidence tending to show that Hasbrook, the owner of the property, and common source of title, executed a *deed in blank*, which was filled up with the name of E. Augustus Curtiss, a fictitious person, whose name was forged to a power of attorney to Garlick, and conveyances made coming down to League, the plaintiff. Upon a theory of this kind the levy and sale were made, consistently, of course, with the most perfect good faith and uprightness of intention. But apply any moral test, or attempt to enter into the *belief* under which the second purchaser acted, and how vague and unreliable it would be, whether by the Court or jury. On the contrary, give no effect to the fact that such a purchaser presents and claims to hold a regular chain of title from the Government down to himself, and you ignore the entire theory ~~under~~ upon which the statute of limitations is based, graduating length of possession to the apparent weight of right under which it is held. It is undoubtedly the fact—especially in a new country, where lands are cheap—that in the practical business of life the junior title is far more often acquired in actual ignorance of the senior title, or in the belief of the invalidity of the senior title, (that validity depending upon difficult questions of law, as yet unsettled, or questions of fact, the evidence of which rapidly passes away,) than acquired with a clear knowledge of an adverse and better title. And the statute of Texas does not enter upon the impracticable ground of the equity to be given to the better title, but leaves it entirely out of view, confining its provisions exclusively to the chain under which the defendant claims, and exacting the shortest period of limitation for the defendant who (irrespective of the better title) is able to deraign down to himself, *ex facie*, a regular chain of transfer from the sovereignty of the soil. No public policy is more salutary to a new State, or is more distinctly apparent in the statutes of Texas, than the speedy settlement of titles to land in actual occupancy of the citizen.

The remainder of the section as to "*color of title*" has no relevancy to this case; but its meaning is clear. It is:

> "A consecutive chain of transfer down to him, her or them in possession, without being regular; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing," (i. e., *be not a deed*,) "or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant, or land scrip, with a chain of transfer down to him, her or them in possession."

The summary of this is to require the party to hold by a chain of *equitable* transfer—not equitable as against the adverse or superior title; but equitable in its own deraignment, in constituting, on its own face, a complete chain. The first link may be a *location* on previously granted land, a merely equitable right on which, in the Federal Court, ejectment can not be maintained, (Sheirburn v. Cordova, 24 How., 423,) although it may in the State Court, and is expressly made color of title. So as to any subsequent link, if it be not a deed it must be an evidence of right, amounting fairly and honestly (i. e. *equitably*,) to a deed, the question being limited to the particular link, and requiring it to be either *legal* or *equitable*. If the defendant in this case had been unable to produce the sheriff's deed, but proved the judgment, execution, levy, sale and return, and payment or credit of the purchase money, and that the deed had not been made owing to the death of the sheriff—a state of case held by the Supreme Court of Texas to constitute a perfect equitable title, on which ejectment can be maintained—it would be "color of title." The nature of the transaction, as respects the adverse title, the previous deed to Curtiss, would not be regarded—the sole point being, instead of a regular deed, had the defendant its equitable equivalent.

That possession for three years by the party himself or his heirs, continued after his conveyance of the land, would not attach to his prior title under the 15th section, (Wright v. Daily, 26 Tex., 730; Harris v. Hardeman, 27 Tex., 248,) are entirely consistent with the other decisions. Possession must be "*under a chain of transfer.*" The law must attribute the possession to the "transfer." The law does not require a party to hold title to the property, but to *hold* a chain of transfer to it. If, in point of fact, he *does not hold* this chain of transfer, but has ceased to do so, he is not within the statute. His own inability to plead the statute does not affect his capacity to make a conveyance enabling another to plead it. The entire theory of the Act of limitations recognizes this difference. A., without any conveyance to land, entering into possession, must hold ten years; but if A., never having had a shadow of title, conveys to B., possession for five years will give B. a title. The Government, having parted with its title, would require a subsequent possession of ten years to give it a right by limitation; but it will enable a junior patentee or locator to obtain a right by limitation in three years. The same is the case with any person whose conveyance will form a regular chain of transfer down from the Government, notwithstanding he may have made a previous conveyance.

GREEN ADAMS,
W. P. BALLINGER,
For Defendants in Error.

News Steam Print.

Supreme Court of the United States.

DECEMBER TERM, 1867.—No. 20.

THOMAS M. LEAGUE'S REPRESENTATIVES, Plaintiffs in Error, *against* DANIEL D. ATCHISON & OTHERS, Defendants in Error.	*Writ of error to District Court of United States for Eastern District of Texas.*

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DECEMBER TERM, 1867.—No. 20.

THOMAS M. LEAGUE'S REPRESENTATIVES, Plaintiffs in Error,
against
DANIEL D. ATCHISON & OTHERS,
Defendants in Error.

Writ of error to District Court of United States for Eastern District of Texas.

ABSTRACT OF THE CASE.

The petition of T. M. League was filed on the 10th of January, 1854. It represents that he was seized and possessed in fee of lot No. 4, in block No. 441, in Galveston, and that the defendants, before the petition was filed, to-wit: on the 1st of January, 1854, entered upon it and ejected him therefrom, (p. 1.) The action is as well to try title as to recover damages. The defendant, Atchison, pleaded (p. 7–8) 1, not guilty; 2, peaceable, adverse, and undisturbed possession of the lot for more than three years next preceding the commencement of the suit, under a regular consecutive chain of title down from the sovereignty of the soil; 3, peaceable, undisturbed, and adverse possession of the lot for more than three years next preceeding the institution of this suit, under color of title; 4, "that the said pretended deed* from the said Southwick to the said League, is null and void." A demurrer to this last plea was sustained, and this plea stricken out. (P. 24–5.)

In the progress of the cause a writ of sequestration was issued and quashed, (pp. 6–7–18,) the petition by leave

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***No such deed is mentioned in the petition.**

amended, (p. 19) another sequestration issued, (p. 21,) a motion to quash the same overruled, (p. 24,) and an order made whereby a surety in the first sequestration bond, (p. 6,) who was wanted as a witness, was released upon the execution of a bond with other surety, (pp. 23–24.) By the marshal's return to the writ of sequestration, (p. 7) and the replevin bond of defendants, (p. 22,) it appears that the value of the property was between *two thousand* and *twenty-five hundred dollars.*

At the trial, *title* was shown by the plaintiff, and none by the defendants. The latter claiming to have *color of title* under a purchase *for ten dollars,* rested the defence upon the 15th section of the act of limitation of Texas, which is as follows:

> That every suit to be instituted to recover real estate, as against him, her, or them in possession, under title or color of title, shall be instituted within three years *next after the cause of action shall have accrued,* and not afterwards; but in this limitation is not to be computed the duration of disability to sue from the minority, coverture, or insanity of him, her, or them having cause of action. By the term title, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title is constituted by a consecutive chain of such transfer* down to him, her, or them in possession, without being regular; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not *extend to or include the want of intrinsic fairness and honesty*; or when the party in possession shall hold the same by a certificate of head-right, warrant, or land-scrip, with a chain of transfer down to him, her, or them in possession; and provided this section shall not bar the right of the Government. Hartley's Dig., Art. 2391.

The bill of exceptions sets forth that the plaintiff gave in evidence certain deeds as showing his derivation of title, to wit: A deed of September 10, 1841, from James Love, Peter J. Menard, and Samuel M. Williams, Directors of the Galveston City Company, to Phineas G. Merritt; a deed of March 4, 1842, from Merritt to Hosea J. Levis; a power of attorney of March 4, 1842, from Levis to Moro Phillips; a deed of February 19, 1846, from Levis by Phillips to Stacy

B. Lewis; a deed of March 16, 1846, from the latter to Francis R. Cobb; a deed of June 28, 1848, from Cobb and wife, to Israel G. Hasbrook; a deed of February 8, 1849, from Hasbrook and wife to E. A. Curtiss; a power of attorney of May 2, 1849, from E. A. Curtiss to Henry S. Garlick; a deed of November 17, 1850, from Curtiss by Garlick, as attorney, to Stephen Southwick; and a deed of December 14, 1853, from Southwick to Thomas M. League. Then the plaintiffs, (p. 44,) in order to show that the defendants claimed under Hasbrook, gave in evidence a deed of the 2d of October, 1849, from the sheriff of Galveston, setting forth that by virtue of an execution of Alfred Edwards against Hasbrook, the sheriff levied on lot No. 4, in block No. 441, in Galveston, and exposed the same for sale at public auction, and the same was struck off to Daniel D. Atchison, he having bid the sum of *ten dollars*, which was more than any others bid or would bid, and the sheriff, in consideration of said sum of *ten dollars*, conveys to Atchison the *right, title, and interest* of Hasbrook in and to said lot. The plaintiff also proved that, at the time of the institution of the suit, the defendants were in possession of the lot, and that Atchison had since continued in possession thereof, (p. 45.)

Whereupon the defendants, (p. 45,) after adducing some testimony for the purpose of showing that the deed to Curtiss was executed with blanks for the name of the grantee, and that the signature of Curtiss to the power of attorney to Garlick was a forgery, gave in evidence a deed from the President of the Republic of Texas to M. B. Menard, made under an act of the Republic, approved December 9, 1836; also, a conveyance from Menard to the Galveston City Company; also the act of the Republic of Texas incorporating the Galveston City Company, approved February 5, 1841; and in the case of Edwards against Hasbrook, the proceedings and judgment, executions, and return thereon, as well as the sheriff's deed to Atchison. The return (p. 60, 61) sets forth, among other things, that the sheriff knew of no property in his county belonging to Hasbrook ; that the attorney for Edwards pointed out the lot in question ; that on the day of sale he was notified by Garlick that the lot was the property of Curtiss, and Garlick, as agent of Curtiss, forbid the sale ; but that, nevertheless, he exposed for sale the *right, title, and interest* of Hasbrook in the lot, and the same was struck off to Atchison for *ten* dollars.

The defendant then gave in evidence (p. 63) the testimony of witnesses *conducing* to prove that Atchison had held peaceable and continuous adverse possession of the lot,* claiming the same under the sheriff's deed since October, 1850, and paid taxes thereon.

The plaintiff, as part of his rebutting proof, gave in evidence (p. 63) facts conducing to show that the deed to Curtiss was regularly executed and delivered, so as to be operative as a conveyance, and that the signature of Curtiss to the power of attorney was not a forgery.

Upon this evidence the Court, after instructing the jury (p. 63) as to the facts necessary to be proved to sustain the deed to Curtiss as a valid and operative conveyance, and also as to the law arising upon the question as to the execution of the power of attorney to Garlick, proceeded to instruct the jury as to the defence of limitation.

After explaining the law as to the fact and manner of possession which must have been held by defendant, the Court further instructed the jury, that to sustain this defence under the plea of defendant, he must have possession under a regular consecutive chain of transfer from the sovereignty of the soil down to the defendant ; and, if there was any want of connection in any part of said chain of transfer, the defence could not be sustained ; that in this case the chain of transfer down to Hasbrook was regular and consecutive, and both parties claimed under him ; that there was no want of such connection between the Galveston City Company and P. G. Merritt, but that the deed, purporting to be from the Directors of the

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* The words for three years next before the commencement of the suit are not here.

Galveston City Company to P. G. Merritt, of September 10, 1841, read in evidence by plaintiff, was a sufficient connection of title in this case; and that between Hasbrook and the defendant, Atchison, there was no want of connection on account of the conveyance of Hasbrook and wife to Curtiss; that the judgment and execution against Hasbrook, and sheriff's deed to Atchison, made a title regular and sufficient on its face, and the jury could not look beyond the face of defendant's title to take into view the previous conveyance from Hasbrook and wife; that the jury must confine their examination to the defendant's chain of transfer, and those being consecutive and regular on their face, were sufficient to sustain the adverse possession; that the sheriff, acting under a judgment and execution against Hasbrook, must be presumed to have the authority to make the levy and sale and deed proved in this case, notwithstanding the lot, before the rendition of the judgment, might have been conveyed away by Hasbrook and wife to plaintiff's grantor, because the jury, on the question of limitation, could not look at the deed from Hasbrook and wife to Curtiss; and that, unless there was some defect or want of authority on the face of the sheriff's deed, the jury could not look beyond it.

At this point in the charge the counsel for plaintiff desired to know whether the jury were to determine the effect of the sheriff's deed to Atchison. The Court replied that the jury were so to determine under the construction placed thereon and the law given them on the subject by the Court, and repeated his instructions as to said deed.

Thereupon the counsel for the plaintiff requested the Court to instruct the jury as follows:

First. That, in order to sustain the plea of limitation, the defendant must show a connected chain of transfer of title by written deeds or by descent, and, if any break or interruption of continuity occurs in this chain of transfer, the defence of limitation is not made out; that, in the present case, there is no legal transfer or conveyance from the Galveston City Company to Phineas G. Merritt sufficient to sustain limitation.

Second. That, if the jury, under the instructions of the Court, find a conveyance from Hasbrook and wife to Curtiss to be valid, then the sheriff had no authority to make the levy, under the execution against Hasbrook, on the lot in question, or to make the deed to Atchison, and there is no such transfer of title from Hasbrook to Atchison as will sustain the plea of limitation.

But the Court declined to give said instructions as asked. To all which rulings, instructions given, and refusals to give instructions as requested, the plaintiff then, and before the jury retired, excepted. Thereupon verdict and judgment were rendered for defendants, (p. 31.)

POINTS AND AUTHORITIES

1. The Court did not determine correctly the effect of the sheriff's sale and conveyance, and yet required the jury to determine according to its instruction, without any regard whatever to the deed from Hasbrook to Curtiss. It erred in instructing the jury (p. 64) that they "must confine their examination to the defendant's chain of transfer, and those being consecutive and regular on their face, were sufficient to sustain the adverse possession; that the sheriff, acting under a judgment and execution against Hasbrook, must be presumed to have the authority to make the levy, and sale, and deed proved in this case, notwithstanding the lot, before the rendition of the judgment, might have been conveyed away by Hasbrook and wife to plaintiff's grantor."

In Kentucky it is held that a purchaser is bound to look to the authority under which an officer acts; and if that fails in the officer, the purchaser acquires no title. Neither the statute nor the execution authorizing a sale of more than is sufficient to satisfy, it is considered that a sale of more is a void act, as to the excess sold beyond what is sufficient, and when it is impossible to see how much would have been sufficient, the whole sale is regarded as radically defective and void. It was so held where, under an execution for $74.23½, a tract of 4,000 acres of land was sold for $370. *Patterson* v. *Carneal's heirs*, 3 A. K. Mar., 619. The Court says: "The sheriff derives his authority to sell and convey land from the law, and his duties as sheriff as prescribed by law. In selling more land than was sufficient to satisfy the execution, he exceeded his authority derived from the law, and his commission as sheriff, and the command of the precept under which he acted. The sale, as made, cannot be so separated and divided into parts and parcels as to be good for one part or parcel of the land, and void as to the residue." The whole sale is therefore held void in law for want of authority in the sheriff to make the sale as he did. *Pepper*

v. *Com.*, 5 Monroe, 30. It is further held, that the voidness of a deed on this ground may be first shown and declared, when the deed is exhibited by a party on the trial of an action of ejectment or trespass, though never before determined in any direct proceeding. *Addison, &c.*, v. *Crow, &c.*, 5 Dana, 277; *Gearhart* v. *Tharp*, 9 B. Monroe, 33; *Isaacs* v. *Gearheart*, 12 Id., 231.

It is yet more clear, that under execution against the lands of Hasbrook, the sheriff had no authority to sell, and Atchison could not, by the sheriff's sale and conveyances to him, acquire the land of Curtiss. *Andrews* v. *Murphy, &c.*, 12 Georgia, 433; *Bell* v. *Chandler*, 23 Id., 359; *Hunter* v. *Hulings, &c.*, 37 Penn., (1 Wright,) 307. Under the statute of Kentucky, subjecting lands to sale under execution, it is distinctly held that land which at the time the sale is made under execution, is in the adverse possession of others than the debtor, is not liable to be sold under the execution—that the sheriff's sale and conveyance thereof pass no title. *McConnell* v. *Brown*. 5 Monroe, 480. The deed in such case is regarded as a nullity. *Wolford* v. *Phelps*, 2 J. J. Mar., 33; *Myers, &c.*, v. *Sanders' heirs*, 7 Dana, 510. Here it must be taken that possession had passed from Hasbrook to Curtiss, according to the deed. (P. 39.)

Under the act of Texas, concerning executions, (Hartley's Dig., Art. 1327, p. 417,) the defendant had the right to designate the property levied on; and if he failed or refused to designate the same, "*it being his own property*," then the levy was to be made. Here the property was designated not by the defendant, but by the plaintiff's attorney, and it was not as the act required the debtor's own property, but was the property of Curtiss. The sheriff knew of no property in his county belonging to the debtor, yet, because the plaintiff's attorney pointed it out, he levied on a lot which belonged to Curtiss. Having made the levy, he offered and exposed for sale, not the lot, but only *the right, title, and in-*

terest of Hasbrook in and to the lot, and the same was struck off to Atchison, "for the sum of $10." which (it is stated in the return) "was more than any other person did or would bid;" there being notice that the lot was the property of Curtiss. Accordingly, the conveyance to Atchison was of nothing more than Hasbrook's right, title, and interest. Under the act of Texas it could be of no more. Hartley's Dig., Art. 1345, p. 421.

It is manifest that the case here is very different from the cases before this Court in 1851 and 1862, as to sales for taxes, when, under the words of the statute, the only question was, whether the action was brought within a certain number of years *after the date of such sales. Pillow* v. *Roberts,* 13 How., 477; or from the time of *recording the tax deed* of sale. *Leffingwell* v. *Warren,* 2 Black, 603. Here the only requisition is that the suit shall be instituted within a certain number of years next *after the cause of action shall have accrued.* The burthen is upon the defendants to show that the cause of action did accrue more than that number of years; in other words, that for that number of years the possession of Atchison has been adverse as against Curtiss and his assigns.

The facts which have been mentioned ought to have been looked at and taken into view in connection with what was laid down in 1 Salk., 246, and *Reading* v. *Royston,* 2 Salk., 423; S. C. (*Reading* v. *Rawsterne,*) 2 Ld. Raym., 830, and since recognized in *Hodgkinson* v. *Fletcher, &c.* 3 Dougl., 34, 26 Eng. C. L., and *Doe dem. Cook* v. *Danvers,* 7 East., 312, and has now become the settled rule, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. *Jackson* v. *Sharp,* 9 Johns., 167. His title draws to it the possession, and to deprive him of that title, the other side has to show that there has been an actual, continued, visible, notorious, distinct, and hostile possession for the time prescribed. *Hauk* v. *Senseman, &c.*, 6 S. & R., 23; *Adams* v. *Robinson*, 6 Barr, (Penn.,) 271; *Hole* v. *Rittenhouss*, 1 Casey, (25 Penn.,) 493; *Martin* v. *Jackson*, 3 Id., 510; *Hood* v. *Hood*, 2 Grant's cas., 236. He must be disseized, ousted, and turned out of possession before the statute can begin to operate on his rights. *Society for Propagation* v. *Town of Pawlet, &c.*, 4 Peters, 54; *Huntington* v. *Whaley*, 29 Com., 297; *Jones* v. *Hockman*, 12 Iowa, (Withrow,) 107. The possession was not taken to be adverse in *Doe dem. Smith* v. *Pope*, 1 Nev. & Man., 385. (28 Eng. C. L.;) *Doe dem. Roffey* v. *Harbrough*, Id., 422, 3 Adol. & El. 67, note (a); *Doe dem. Bullen, &c.* v. *Wells*, 2 Adol. & El., 17, 29 Eng. C. L.; or *Doe dem. Goody* v. *Carter*, 9 Adol. & El. N. S., 863 Eng. C. L.

We have to inquire, then, when, and by whom Curtiss was disseized, ousted, or turned out of possession. Certainly he never was by Hasbrook. From and after the conveyance from Hasbrook and wife to Curtiss, there was no title or color of title in Hasbrook, and none was asserted by him. So far from his having adverse possession, it does not appear that after the conveyance to Curtiss, Hasbrook had possession at all. According to the sheriff's return, (p. 61,) Hasbrook had, at the time of the levy, been absent from the county for several months, and the sheriff had not found an agent or attorney, in fact, upon whom to call.

If, after the conveyance to Curtiss, Hasbrook had any possession at all, his possession must havebeen the possession of Curtiss; he must have held at the will of Curtiss, and might have been put out at any time Curtiss pleased. If he had possession by the sufferance of Curtiss, rent free, still he was no more than tenant at will. Woodfall on Landl. & Ten., ch. 5, § 4, pp. 284-6 of 9th Lond. edi., (1867.) He might have continued in possession for much more than three years, and yet be unable to sustain the defence that cause of action against him had accrued more than three years. Woodfall pp. 188–9; *Garrard* v. *Tuck*, 8 Man. Gr. & S., 251, 65 Eng. C. L.

Then suppose Hasbrook was not only tenant at will, but made a direct transfer of his interest. The tenancy at will would not be determined by such transfer without notice to Curtiss. *Carpenter* v. *Colins*, Yelv. 73; *Pinhorn* v. *Souster*, 8 W. H. & G. (Excheq.) 772; Woodfall, p. 189.

There was, in fact, no such direct transfer; but there was, by the sheriff's sale and conveyance, an indirect transfer of Hasbrook's *right, title, and interest*. This conveyance has not, on its face, even the appearance of giving Atchison the fee simple title. His possession under it must, in presumption of law, be a possession in amity with, and in subservience to the title of the owner of the fee. *Rung.* v. *Shoneberger*, 2 Watts, 27; *Clarke* v. *McClure*, 10 Grat., 305; *Harvey* v. *Taylor.*, 2 Wallace, 349. Even if the sheriff's sale and conveyance had been, not merely of Hasbrook's right, title, and interest in the lot, but of the lot itself, still, under the sale and conveyance to him, he occupied no better condition in relation to the *title* of Curtiss than Hasbrook himself did. So it is held in Kentucky under the statute of limitations of seven years. *Thruston, &c.,* v. *Masterson, &c.,* 9 Dana., 255. By this decision, and by decisions elsewhere, it is established that, if immediately before the sheriff's sale and conveyance, the possession was not adverse against Curtiss, the mere sale and conveyance did not make it adverse. *Phillips* v. *Johnson, &c.,* 14 B. Monroe, 173–4. On this point the decisions in Massachusetts are exceedingly strong.

In that State the statute of 1783, ch. 57, §§ 2 and 3, providing expressly that, when lands are taken in execution, the officer shall deliver seizin and possession to the creditor, it is held that, when an execution is duly levied on lands *liable by law to be extended* in satisfaction of the execution, the judgment creditor is, by virtue of the levy, actually seized of those lands, provided the judgment debtor, or his devisee, or the alienee of his devisee, be the [illegible] terre tenant. *Langdon* v. *Potter, &c.*, 3 Mass., 215: *Gore* v. *Brazier*, Id., 539; *Wyman* v. *Brigden*, 4 Id., 155. But, if the land was not the debtor's, the extent does not, as against the lawful owner, show title or seizin. *Bott* v. *Burnell*, 9 Mass., 98. The Court holds that "where the question is with one not a party to the execution or judgment, and not claiming by privity of title, there is nothing conclusive or effectual in the sheriff's return. The title or seizin of a third person is not affected by it." S. C., 11 Mass., 165. The levy upon lands not belonging to the judgment debtor, and of which the title and possession are in another, will not oust the person thus in possession under a legal title. *Blood* v. *Wood*, 1 Metcalf, 534; *Howe, &c.*, v. *Bishop*, 3 Id., 28. These cases are recognized in Texas. *Howeth* v. *Mills*, 19 Texas, 266.

Thus it is clearly established that, after the sale and conveyance to Atchison, for *ten dollars*, of Hasbrook's right, title, and interest, something more than that sale and conveyance was required to make the possession adverse as against Curtiss, or his assigns. *Doe dem. Souther, &c.*, v. *Hull, &c.*, 2 Dow. & Ry., 38—16 Eng. C. L.; *Doe dem. Milburn* v. *Edgar*, 2 Scott, 732—30 Eng. C. L.

There may be an act which does not amount to a disseizin, but which the true owner may, at his election, treat as such. *Taylor dem. Atkyns* v. *Horde, &c.*, 1 Burr, 111, Cowp., 689. *Bayley*, J., refers to this case in *Doe dem. Soutter, &c.*, v. *Hull, &c.*, 2 Dow. & Ry., 38—16 Eng. C. L. The principle is discussed in note 285 to Co. Lit., 330 *b.*, and is recognized in Massachusetts in some of the cases already referred to. It is there admitted that the true owner may elect to consider himself disseized, for the sake of his remedy, and with a view to try his title. *Blood* v. *Wood*, 1 Metcalf, 534. On this principle, with which all of the plaintiff's proof concurs, (see p. 45,) it cannot be considered there was disseizin before the 1st of January, 1854, (pp. 1, 2, and 19.)

What, then, must the defendants show to prove adverse possession at an earlier period? The possession of *Atchison* not being at first adverse to Curtiss, it would require some decisive act or declaration to make it so. *McMasters* v. *Bell*, 2 Penrose & Watts, 183; *Zeller's lessee* v. *Eckert, &c.*, 4 How., 295; *Creigh's heirs* v. *Henson*, 10 Grat., 233; *Martin* v. *Jackson*, 3 Casey, (27 Penn.,) 510. Whenever the possession of one person is shown to have once been in subordination to the title of another, it will not be adjudged afterwards adverse to such title, without clear and positive proof of its having distinctly become so, for every presumption is in favor of the possession continuing in the same subordination to the title. *Hood* v. *Hood*, 2 Grant's Cas., (Penn.,) 237; *Bannon, &c.*, v. *Brandon*, 10 Casey, (34 Penn.,) 267.

In the present case there is no such clear and positive proof—certainly no proof of the possession having become adverse for so long a term as three years before the commencement of the action. *Sutton* v. *Carabajal*, 26 Texas, 500. Atchison's claiming the lot under the sheriff's deed since October, 1850, certainly falls far short of the proof that is required of adverse possession in such a case as this. Though he "paid taxes thereon," still that would not be enough, even if he had been so paying for more than three years, which does not appear and is very improbable. It does not appear to have been proved, in that or any other way, that he had held continuous and adverse possession of the lot for three years.

Even when a bill of exceptions states that a party *"proved"* such and such facts, this has been received as meaning nothing more than that he offered evidence thereof. *Riggin* v. *Patapsco Ins. Co.*, 7 Har. & J., 295. Here the bill of exceptions does not go so far; it merely states (p. 63) that the defendant "gave in evidence the testimony of witnesses *conducing* to prove," &c., which means no more than tending to prove. Between evidence *conducing* to prove contrary facts, it is not for the Court but the jury to decide. *Clay* v. *Johnson, &c.*, 6 Monroe, 668. Though the defendants proved facts *conducing* to show certain things, the Court erred in instructing, as it did in *Trotter* v. *Sanders, &c.*, 7 J. J. Mar., 321. There being here a question of fact for the jury to determine, (*Boucher* v. *Williamson*. 1 Dana, 228; *Gates* v. *Blincoe, &c.*, 2 Id., 158.) the Court, to enable them to ascertain the fact, should have submitted to their consideration any evidence tending to the proof of the issue, however weak. *Davis, &c.*, v. *Barney*, 2 Gill. & J., 404; *Morgan* v. *Bitzenberger*, 3 Gill., 334. It was competent to the judge to instruct the jury, provided he instructed them correctly, as to the legal operation upon the question of adverse possession, both of the deed from Hasbrook to Curtiss, and the deed from the sheriff to Atchison. But, at the same time that they were so instructed, it should have been submitted to the jury to determine the question of fact, whether or no there had been adverse possession for the three years; and they should have been told what should be the verdict if this fact was found one way, and what it should be if the fact were found the other way. *Wright, &c.*, v. *Small's lessee*, 4 Yeates, 568. Whereas, on the question of adverse possession, the judge has, in effect, charged the jury that all the evidence adduced by the plaintiff is of no avail. *Firem. Ins. Co.* v. *Walden*, 12 Johns., 520; and thus withdrawn from the jury the important privilege reposed in them by law, of drawing their own conclusion from that evidence. *Work, &c.*, v. *Maclay's lessee*, 2 S. & R., 418. He has assumed that Atchison held against Curtiss and his assigns, adverse possession for the requisite three years; and in this assumption has greatly erred. *Griffith, &c.*, v. *Dicken*, 4 Dana, 564; *Adams, &c.*, v. *Tiernan, &c.*, 5 Id., 396; *Stith* v. *Jones*, 4 B. Monroe, 377-8

In order to preserve a just balance between the distinct powers of the Court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the Court, and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact for his direction in point of law. Upon matter of fact the jury should be left to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no further than it corresponds with the conclusion of their own judgment. *Firem. Ins. Co.* v. *Walden,* 12 Johns, 518. Whenever the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion, and not as direction, and the jury should be left to understand clearly that *they* are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence, in cases of doubt. S. C., 519. Certainly nothing should appear in the charge from which the jury might reasonably infer they were precluded from considering the facts. *Allen* v. *Kopman,* 2 Dana, 221; *Neptune Ins. Co.,* v. *Montell,* 8 Gill, 237. Even though a judge lays down a principle unquestionably correct in the abstract, yet if it be stated in a manner likely to produce misapprehension of his meaning, or a misapplication of it to the facts, it is error. *Sampson* v. *Sampson, &c.,* 4 S. & R., 333. In this case, if the jury had sufficient knowledge of law to know that the question of adverse possession for more than three years was material, they must have considered themselves bound by the opinion of the Court as a direction as to the legal effect of the evidence. S. C.

There can be no doubt that the charge of the Court has distracted the attention of the jurors from the true merits of the case, so far as those merits were involved in the material question of adverse possession. *Snyder's lessee, &c.* v. *Snyder,* 6 Binn., 498; *Deal, &c.* v. *McCormick,* 3 S. & R., 348.

On this question the charge left nothing to the jury. *Jones* v. *Wildes*, 8 S. & R., 150; the fact, which was the very hinge of the cause, was taken from them. *Hershey* v. *Hershey*, 8 S. & R., 335; *Childerston, &c.* v. *Hammon*, 9 Id., 68. Had the cause been properly submitted to the jury on this question, it is reasonable to infer that the verdict would have been for the plaintiff; whereas they were so instructed by the Court as to require them to find for the defendants. *Armstrong, &c.* v. *Hussey, &c.*, 12 S. & R., 316.

In withdrawing from the consideration of the jury what it was proper for them to consider, the charge was as plainly erroneous as the charge in the following cases: *U. S.* v. *Tillotson, &c.*, 12 Wheat., 181; *Morris* v. *Buckley, &c.*, 1 Har. & Gill., 110; *Sanderson* v. *Marks*, Id., 257; *McLanahan, &c.* v. *Univ. Ins. Co.*, 1 Peters, 182; *Tayloe* v. *Riggs*, Id., 601; *Read* v. *Greathouse*, 7 Monroe, 559; *Bucklin* v. *Thompson*, 1 J. J. Mar., 226; *Reed* v. *Bragg*, 6 Id, 621; *Smith's heirs* v. *Roberson, &c.*, Id., 637; *Barclay* v. *Blackburn*, Id., 115; *Spangler* v. *Hummer*, 3 Penrose & Watts, 373; *Newbold* v. *Wright, &c*, 4 Rawle, 211; *Thorne* v. *Haley*, 1 Dana., 268; *Southard* v. *Hall*, 3 Id., 59; *Sullivan* v. *Enlers*, Id., 67; *Trovillo* v. *Tilford*, 6 Watts, 468; *Nieman* v. *Ward*, 1 W. & S., 82; *Griffith* v. *Dicken*, 2 B. Monroe, 24; *Hocker* v. *Jamison*, 2 W. & S., 442; *Thompson* v. *Thompson*, 17 B. Monroe, 27.

In a case in Kentucky, in 1834, the judgment was reversed because the instructions did not necessarily import that the possession must have been adverse, and continued without interruption for the time prescribed, and, when applied to the facts, might have deluded and misled the jury, and thus have produced a verdict different from that which might have been the fruit of an instruction presenting the law with proper precision. *Forman, &c.* v. *Ambler*, 2 Dana, 111. In Pennsylvania, in 1841, it was said that, " if, after giving the charge a fair construction, it tends to mislead the jury by inducing them to believe that there is one point of defence, when, in truth, there are two, and the point omitted the most uncertain, the cause should be remanded for another hearing." *Relf* v. *Rapp,* 3 W. & S., 27. Because of instructions misleading and erroneous, the judgments were reversed in *Salter* v. *Myers*, 5 B. Monroe, 281; *Kednill* v. *Hughes,* 7 Id., 371; *Swigert* v. *Graham*, 7 Id., 669; *Mayes* v. *Farish,* 11 Id., 41; and *Andrews* v. *Marshall*, 26 Texas, 215.

II. Not only did the Court err in what it did, and what it omitted to do, as regards the question of adverse possession, but it also erred upon the question as to the defendants having color of title as against Curtiss and his assigns. In addition to what is particularly mentioned in the preceding point, it erred in telling the jury "there was no want of connection on account of the conveyance of Hasbrook and wife to Curtiss; that the judgment and execution against Hasbrook and sheriff's deed made a title regular and sufficient on its face, and the jury could not look beyond the face of defendant's title to take into view the previous conveyance from Hasbrook and wife;" that they could not look at the deed from Hasbrook and wife to Curtiss; and that unless there was some defect or want of authority on the face of the sheriff's deed, the jury could not look beyond it. Especially did the Court err in refusing to give the last instruction asked by the plaintiff.

The question here is different from those which came before this Court under the acts of North Carolina and Tennessee. *Patton's lessee* v. *Easton,* 1 Wheat., 476; *Walker* v. *Turner*, 9 Id., 541. But the reasoning of this Court, so far as it appears in those cases, is in favor of what is now insisted on. *Powell's lessee* v. *Harman, &c.,* 2 Peters, 241; for this Court deemed it quite material that the sale and conveyance by which the connection was to be formed were void; its opinion was that the conveyance made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant. *Powell's lessee* v. *Harman,* 2 Peters, 241. The force of the reasoning of this Court is nowise impaired by the consideration that in a case depending upon a statute of Tennessee, the Court yielded its opinion to the construction given by the judicial tribunals of Tennessee to the statute of that State. *Green* v. *Neal's lessee,* 6 Peters, 295. The words "a connected title in law or equity, deducible of record from the Commonwealth," are found in a statute of Kentucky. *Skyles' heirs* v. *King's heirs,* 2 A. R. Mar., 387; and in a statute of Illinois, taken from that of Kentucky. *Moore* v. *Brown, &c.,* 11 How., 425. The reasoning of this Court in the latter case, as in the cases from Tennessee, is, so far as it goes, in support of our position, that the defendant has not shown a consecutive chain of transfer down to him, because, as Hasbrook and wife had, before the judgment against him, conveyed their title, the sheriff's deed, made on a nominal sale of Hasbrook's interest, conveyed or transferred no title to the property, and could only be regarded as the sheriff's individual deed, and so only available under the *sixteenth* section of the Texas act, after *five* years' possession. (Hartley's Dig., Art., 2392.)

This, it is submitted, must be the conclusion of the Court, when, in accordance with what it has adopted as the rule to guide its judgment, (*Henderson & wife* v. *Griffin,* 5 Peters, 155; *Green* v. *Neal's lessee,* 6 Id., 295; *Harpending* v. *Dutch Church,* 16 Id., 493,) it looks to decisions of the highest judicial tribunal of Texas for the construction of a statute of that State relating to titles to real property, and the limitation of actions therefor.

While cases from other States may be instructive, both as showing the general doctrine applicable to acts of limitation, and the special construction of particular statutes, it is to be observed that the language of the *three* years' act of limitation of Texas is different from that of the statutes considered in the cases just referred to, and has been thought by the Supreme Court of Texas to authorize a stricter rule than prevails in other States under their acts of limitation, or than prevails under other sections of the Texas act (§§ 16, 17) providing for periods of *five* and *ten* years' limitation, under different requisites. Hartley's Dig., Art., 2392, 2393; *Cunningham* v. *Frandtzen*, 26 Texas, 49.

The Court holds that when a possessor wishes to avail himself of the shortest period known to the law, he must bring himself clearly within the requisites of § 15, both in his plea and in his proof. *Castro* vs. *Wursbach*, 13 Texas, 131; *Mason* vs. *McLaughlin*, 16 Ib. 28–9; *Williamson* vs. *Simpson*, 16 Ib., 444; *Sutton, &c.*, vs. *Carabajal, &c.*, 26 Ib., 497. And the defence is regarded not with favor, but strictly. Thus the plea of three years' limitation cannot be sustained by a chain of title derived through a void sheriff's deed, as where the judgment was a nullity. *Wilson* vs. *Power*, 18 Texas, 592; or through a void grant. *Marsh* vs. *Weir*, 21 Ib., 97; *Smith* vs. *Power*, 23 Ib., 33; or through a void deed. *Wofford* vs. *McKinna*, Ib., 36; *Kilpatrick* vs. *Sisneros*, Ib., 113.

From these and other cases it appears that, in Texas, when the protection of the shortest limitation is invoked, and the wrongful holder relies not on any presumption of the failure of his evidence by lapse of time, but on a dry, naked, legal defence, he must make out his case clearly, and keep within the exact letter of the statute; and in doing so he must show a connected chain of transfer, with no link wanting or imperfect. When one of the conveyances is *void*, either on its face or by extrinsic evidence, it ceases to be a "transfer," within the meaning of the statute; and especially when such a conveyance is made not directly by a prior owner, but, indirectly, through an officer of the law.

The doctrine of the Supreme Court of Texas is well illustrated in the case before it in 1859, of a grant of land to Prior A. Holder, as a colonist. He being married, the land was under the laws of that State community property, and, as such, subject to division between the surviving husband and the heirs of the deceased wife. (*Yates* v. *Houston*, 3 Texas, 452.) The husband sold the whole of the land, being half* a league, to Thompson & Co., and executed a title bond, on which they sued his administrator and his infant son and daughter, who answered by guardian *ad litem*. A decree was made in Bastrop for setting apart the half league and appointing a commissioner to execute to the plaintiff a deed, which should convey to them "all the interest that the heirs of the said Prior A. Holder may have had in and to the lands so set apart," according to which decree the deed was made. The daughter and her husband and the son's widow instituted suit, claiming as heirs of the deceased wife half of the half league. The Court below was of opinion that the decree and deed only affected the rights of the children of Prior A. Holder, as his heirs, and did not affect their rights as heirs of their mother; yet held that the same constituted such color of title as would support a possession of three years under the appropriate plea. The Supreme Court of the State, while concurring in the opinion that the decree and deed did not affect the interest, as heirs of the mother, held that said decree and deed, and subsequent conveyances, did not constitute such title, or color of title, as would support the plea of the statute of limitations of *three* years. The Court said: "These muniments do not constitute title; because, as has been already said, the Bastrop decree did not touch the interest of the heirs of Julia Holder, *as such*, in the land. Nor can there be color of title, as defined by the statute, when there is a complete *hiatus* in the chain. Color of title differs from title only in externals. The substance of both is the same. Were this not so—if color of title were something extrinsically and substantially less or weaker than title, then the wisdom of the legislature could not be vindicated in applying the same period of limitation to a possession supported by the one, as is applied to a possession supported by the other. The shortest period of limitation, of which the defendants could avail themselves in support of the title exhibited in evidence, is *five* years." *Thompson* v. *Cragg*, 24 Texas, 596. Other cases support the same principle—that to sustain a defence under the *three* years act of limitation, the conveyances in the chain of transfer must be not only apparently, but actually good. As the patent to Tyler could not constitute color of title, after the sheriff's sale, in *Wright* v. *Daily, &c.*, 26 Texas, 731, so here the sheriff's sale and conveyance could not constitute color of title after the conveyance to Curtiss. So in *Berry* v. *Donley*, 26 Texas, 747, the defendants had neither title nor color of title under a conveyance which passed neither a legal or equitable title; and the same is the case here. All this is quite consistent with the apparent object of § 15, which seems to have been not to assist those who have filched the rightful owner's title by an illegal transfer, but to protect those who had fairly received a junior and inferior Government grant, and held it by a perfect chain of transfer directly from the Government against the claim of the elder grantee; in other words, to protect the new settlers claiming under the Republic against Mexican and Spanish titles.

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*A league of land had been located, but the person who located it reserved the other half of it for locating, surveying, &c.

III. When the defence is set up that the transfer to Atchison of Hasbrook's "right, title, and interest," for *ten dollars*, was not a transfer in subordination to the deed of Hasbrook to Curtiss, but a transfer of the whole fee simple in a lot worth from *two thousand to twenty-five hundred dollars*, there arises a question of "fairness and honesty." In dealing with such a question, judges have, on several occasions referred to *Ld. Eldon's* language as to cases where "the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction." *Coles* v. *Trecothick*, 9 Ves., 246. In Kentucky there have been cases of sales of lands under executions where the price was so small, compared with the value of the land, and the sacrifice was so great, that it shocked the moral sense. *Blight's heirs, &c.*, v. *Tobin, &c.*, 7 Monroe, 616; *Howell's heirs* v. *McCreery's heirs, &c.*, 7 Dana, 390. It was thought that a jury might be at liberty to infer that the sale was fraudulent in *Dougherty, &c.*, v. *Linthicum, &c.*, 8 Id., 200. So in Texas it has been thought that in some cases the disproportion might be so shocking and enormous as to justify a rescission of the sale. Slight additional circumstances, it was said, would justify the inference that the sale was fraudulent, when the inadequacy of price paid was so enormous as not to amount to more than one twentieth of the value. *Allen* v. *Stephanes*, 18 Texas, 672. Here it would not be more than the two hundreth part. The question of fairness and honesty should have been submitted to the jury. *Wright* v. *Mattison*, 18 How., 59.

The Court seems to have thought, in 1860, with the light then before it, that the words "intrinsic fairness and honesty," in § 15 of the three years' limitation act of Texas, were intended to designate the good faith necessary in obtaining the "memorials or muniments" of the transfer to the defendant, and had no reference to the good faith to be used towards the rightful owner. *Davila* v. *Mumford, &c.*, 24 How., 222. In the present case, however, the means taken to obtain a shadow of title under a forced sale, after the judgment debtor had fairly sold the land to Curtiss, and after the purchaser had actual notice that the lot was the property of Curtiss, cannot well be considered, even under the limitation of this Court, as "intrinsically fair and honest." Such appears to be the view of the Supreme Court of Texas.

In a case where the plaintiff's title was, through a sale under execution, against T., and the defendants claimed under the patent to T., the Court said: "If the patent, by any latitude of construction, could be considered as color of title, after the sheriff's sale, certainly such a title could not be said to be intrinsically fair and honest." *Wright* v. *Daily*, 26 Texas, 731-2.

There being a miscarriage in the way that the case went to the jury, (*Mackley* v. *Pattenden*, 1 El. Best. & Smith, 183—101 Eng. C. L.,) the judgment should be reversed, the verdict set aside, and a new trial granted.

CONWAY ROBINSON
AND
WM. G. HALE,
For Plaintiff in Error.